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No. 85-

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM 1985

HAROLD CRANKE and
BENJAMIN SEYMOUR,

Petitioners,

v.

FRANK HAYGOOD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NINTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

1. WHETHER THE NINTH CIRCUIT ERRED BY REFUSING TO APPLY PARRATT v. TAYLOR TO A CASE INVOLVING A NEGLIGENT INTERFERENCE WITH A LIBERTY INTEREST.

2. WHETHER THE NINTH CIRCUIT ERRED IN REJECTING PETITIONERS' CLAIM THAT THEY WERE PROTECTED FROM LIABILITY BY A QUALIFIED IMMUNITY.

3. WHETHER AN AWARD OF ATTORNEY'S FEES UNDER 42 U.S.C. SECTION 1988 MUST BE PROPORTIONATE TO THE RECOVERY IN ORDER TO BE REASONABLE.

TABLE OF CONTENTS

	Page
ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS	1
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	7
REASONS FOR GRANTING THE PETITION	22
I THE NINTH CIRCUIT HAS CLEARLY ERRED BY REFUSING TO APPLY PARRATT V. TAYLOR TO A CASE INVOLVING NEGLIGENT INTERFERENCE WITH A LIBERTY INTEREST	27
A. The Ninth Circuit Mistakenly Found That Petitioners Had Acted Pursuant To An Established State Policy	28
B. Parratt v. Taylor Applies To Negligent Deprivations Of A Liberty Interest	33
C. Plaintiff Was Afforded Adequate Process	42

Table of Contents (continued) Page

II THE NINTH CIRCUIT ERRED IN REJECTING PETITIONER'S CLAIM THAT THEY WERE PROTECTED FROM LIABILITY BY A QUALIFIED IMMUNITY 46

III THE NINTH CIRCUIT ERRED IN IGNORING PETITIONERS ARGUMENT THAT ANY AWARD OF ATTORNEY'S FEES UNDER 42 U.S.C. SECTION 1988 MUST BE PROPORTIONATE TO THE RECOVERY IN ORDER TO BE REASONABLE, AND THAT THE ATTORNEY'S FEE CLAIM IN THIS CASE IS EXCESSIVE 54

CONCLUSION 65

TABLE OF AUTHORITIES

Cases	Page
Benson v. Hightower (9th Cir. 1980) 633 F.2d 869	52
Board of Regents (9th Cir. 1981) 660 F.2d 1345	34
Brewer v. Blackwell (5th Cir. 1982) 692 F.2d 387	34
City of Riverside v. Rivera (1985) 106 S.Ct. 5	60,61
Daniels v. Williams (4th Cir. 1983) 748 F.2d 229	34
Davidson v. O'Lone 3rd Cir. 1984) 752 F.2d 817	34
Davis v. Scherer (1984) 468 U.S. ___, 104 S.Ct. 3012	47,50
Edleman v. Jordan (1974) 415 U.S. 651	29
Fountila v. Carter (9th Cir. 1978) 571 F.2d 487	55,59
Harlow v. Fitzerald (1982)	23,46,47,51
Haygood v. Younger (E.D. Cal. 1981) 527 F.Supp. 808	7

Table of Authorities, (continued)

Cases	Page
Haygood v. Younger (9th Cir. 1985) 769 F.2d 1350	2
Haygood v. Younger (9th Cir. 1983) 718 F.2d 1472	2
Hensley v. Eckerhart (1983) 461 U.S. 424	58,59
Hudson v. Palmer (1984) 104 S.Ct. 3194	26
In re Haygood (1975) 14 Cal.3d 801	19,21,29
Kentucky v. Graham (1985) ___ U.S. ___	63
Kush v. Rutledge (1983) 103 S.Ct. 1483	34
Logan v. Zimmerman Brush Co. (1982) 455 U.S. 422	23,passim
Manhart v. City of Los Angeles (9th Cir. 1981) 652 F.2d 904	62
Monroe v. Pape (1961) 365 U.S. 167	39
Parratt v. Taylor (1981) 451 U.S. 527	22,passim

Table of Authorities, (continued)

Cases	Page
Procunier v. Navarette 434 U.S. at 565	51
Rivera v. City of Riverside (9th Cir. 1982) 679 F.2d 795	61
Wakinekona v. Olim (9th Cir. 1981) 664 F.2d 708	35
Zweibon v. Mitchell (D.C. Cir. 1983) 720 F.2d 162	48

STATUTES, CODES AND OTHER AUTHORITIES

28 United States Code	
§ 1254(1)	2
§ 1983	4
§ 2101(c)	3
42 United States Code § 1983	3
42 United States Code § 1988	54
Penal Code § 4531	10
Federal Rules of Civil Procedure Rule 50(b)	6
Rules of the Supreme Court of the United States	
Rule 20	3
Rule 29(1)	3
United States Constitution	
Eight Amendment	3
Eleventh Amendment	29
Fourteenth Amendment's	39
Fifteen Amendment	3

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HAROLD CRANKE and BENJAMIN SEYMOUR Petitioners, v. FRANK HAYGOOD, Respondent.	)

ON PETITION FOR WRIT OF CERTIORARI
TO THE NINTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Petitioners Harold Cranke, and Benjamin Seymour, respectfully pray that this Court issue a writ of certiorari to review the judgment and en banc opinion of the United States Court of Appeals for the Ninth Circuit in Haygood v. Younger, et al., No. 81-4686 which was filed on August 27, 1985.

OPINIONS BELOW

The en banc decision of the Ninth Circuit Court of Appeals is reported as Haygood v. Younger 769 F.2d 1350 (9th Cir. 1985). A copy of this opinion is attached to this petition as Appendix A. The panel opinion of the Ninth Grant Court of Appeals is reported as Haygood v. Younger, 718 F.2d 1472 (9th Cir. 1983). A copy of that opinion is attached to this petition as Appendix B.

JURISDICTION

The opinion of the Ninth Circuit Court of Appeals was dated and filed on August 27, 1985. The judgment sought to be reviewed was entered on the same date. Jurisdiction to review the Court of Appeals' judgment in this civil case by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254(1). This petition for writ of certiorari is filed within the 90-day period

prescribed by 28 U.S.C. § 2101(c), as computed in accordance with Rule 20 and Rule 29(1) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eight Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Amendment XIV:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

The Civil Rights Act of 1871 (42 U.S.C. § 1983) provides:

> Every person who, under color of any statute, ordinance, regulation, custom,or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

> deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Plaintiff/respondent Frank Haygood filed his complaint pursuant to 28 U.S.C. § 1983 on November 13, 1975. The complaint sought damages and declaratory relief against 16 defendants, including petitioners. A summons was issued the same day (CD).[1/]

On December 23, 1975, the defendants, including petitioners, filed a motion to dismiss. On April 13, 1976, the District Court issued an order which dismissed a number of defendants and a number of claims.

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1. "CD" refers to the Clerk's Docket entries in the United States District Court for the Eastern District of California for the various pleadings and orders in this case.

In response to an additional motion the District Court issued an order on March 21, 1978 dismissing additional portions of plaintiff's complaint.

On March 31, 1978, defendants Gunn, Wipf, Spangler and petitioners Cranke and Seymour answered (CD 24).

After more than six years of pretrial proceedings, jury trial finally began in this case in June of 1981. Only five of the original sixteen defendants remained in the case when it went to trial (CD 1).

After presentation of respondent Haygood's case, the District Court granted a motion for a nonsuit on behalf of three of the defendants (RT Vol. III, p. 501-506).

On June 9, 1981, the jury returned verdicts against petitioners, but respondent Haygood's recovery was limited to a total of $2,090.00 (CD 92-93).

After the verdicts were returned on June 9, 1981, respondent Haygood made an oral motion for additur, which was denied, as well as an oral and unsupported request for attorney's fees and costs. (RT Vol. III, p. 739-740).

On June 22, 1981, petitioners filed a timely motion for a judgment notwithstanding the verdict pursuant to Rule 50(b) of the Federal Rules of Civil Procedure (CD 97).

On July 24, 1981, respondent filed a motion seeking $75,918.75 in attorney's fees (CD 100).

Respondent's belated opposition to the J.N.O.V. motion was filed on July 27, 1981 (CD 101).

On August 7, 1981, petitioners served a request for the production of documents on respondent Haygood's counsel in connection with his motion for attorney's fees (CD 108). On August 17, 1981

petitioners filed an opposition to the motion for attorney's fees (CD 117).

On November 30, 1981, the District Court issued two lengthy opinions. In its first opinion, which the court ordered published, the District Court denied petitioners' motion for a J.N.O.V. See Haygood v. Younger 527 F.Supp. 808 (E.D. Cal. 1981).

In its second opinion filed on November 30, 1981, the District Court awarded Haygood attorney and paralegal fees in the amount of $45,383.17.

Petitioners' appeal followed.

STATEMENT OF FACTS

The facts surrounding Respondent Haygood's claim for relief were not materially disputed but they are complex.

The evidence, viewed in the light most favorable to the respondent, supports the following factual summary.

The saga begins in 1946 when respondent Frank Haygood was convicted of escape and sentenced to state prison for a term not to exceed ten years. This was Mr. Haygood's "O" term; he was paroled on August 9, 1948 (RT Vol. II, p. 270).

In 1949 Mr. Haygood was convicted of five counts of forgery and was sentenced to concurrent terms of imprisonment of from one to fourteen years on each count. Those terms were aggregated and were designated plaintiff's "A" term.

Plaintiff's "A" term ran concurrent to his "O" term. Commencement of the "A" term began April 1, 1949. Mr. Haygood's "O" term was completely discharged on June 29, 1953 (RT Vol. II, p. 270-271).

After being paroled in 1956, plaintiff was convicted of carrying a concealed weapon and was sentenced to state prison for a term not to exceed five years.

This offense was designated plaintiff's "B" term and was concurrent to his earlier terms. It commenced on April 25, 1956[2/] (RT Vol. II, p. 271).

On or about December 21, 1958, Mr. Haygood escaped from custody while serving his "A" and "B" terms. While he was at large, he committed a robbery and was convicted on January 5, 1959. He was sentenced on the robbery conviction to an indeterminate life term which was designated his "C" term. Service on the "C" term began on January 8, 1959. The trial judge ordered the "C" term to run concurrently to previously imposed terms, which at that time were the "A" and "B" terms (RT Vol. II, p. 271).

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2. Haygood would therefore have served the maximum term on his "B" term on April 26, 1961 if his term had not been interrupted (RT Vol. II, p. 271).

Subsequently, on or about April 14, 1959, Haygood entered a guilty plea to a violation of the then existing provisions of Penal Code section 4531 (escape), and was sentenced to an indeterminate life term with a one-year minimum. In sentencing Haygood, the Humboldt County Superior Court orally recited that "he be committed to the state prison for the term prescribed by law, the sentence to run at the time he would otherwise have been discharged." This term was designated plaintiff's "D" term by the Department of Corrections (RT Vol. II, p. 271-272).

The abstract of judgment for Mr. Haygood's 1959 conviction, reflected the oral pronouncement of judgment. After printed language which read "It is ordered that the sentences shall be served in respect to one another as follows," a section intended to apply only to sentences on

multiple counts in the same judgment, the following typewritten entry appears: "Sentence to commence at the time said defendant would otherwise have been discharged." Following the printed entry "and in respect to any prior incompleted sentence(s) as follows" a typewritten entry states, "Same as above." The instructions on the printed form direct the court to enter there its ruling on whether the new term is to be "concurrent or consecutive to all incomplete sentences from other jurisdictions." (Def. Trial Exh. N.)

Respondent Haygood acknowledged that upon his return to prison at Vacaville in 1959 it was determined that his "D" term (escape) was consecutive not only to his "A" and "B" terms but also to his "C" term. Sixteen years later, the California Supreme Court would determine that his determination

was a "misinterpretation" of the 1959 escape judgment.

Mr. Haygood acknowledges that neither petitioner Seymour nor petitioner Cranke had anything to do with this aspect of the case (RT Vol. I, pp. 111, 218).

While in prison in San Luis Obispo Haygood appeared before the Adult Authority on October 8, 1970 for a parole hearing.

In conjunction with the granting of parole, a three-member panel of Adult Authority acted on October 8, 1970 to fix plaintiff's "C" term (robbery) at ten years and his "D" term (escape) at five-and-one-hal years. Respondent Haygood was given a final discharge date on all his terms of July 8, 1974. Because the October 8 action fixed the "C" term at less than the time already

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served, an "administrative discharge"[3/] of that term was recorded, effective retroactively to January 8, 1969. Although Haygood's prison records indicated that he had completed the maximum possible sentence on his "A" and "B" terms as of 1963 and 1961, respectively, the Adult Authority continued to refer to those terms in

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3. An "administrative discharge" was different from an actual discharge of a sentence. In order to be granted parole, an inmate had to be serving time on the sentence from which he was being paroled. Thus, if he was serving time on more than one sentence, which ran consecutive to one another, he could not be paroled until he actually started serving time on the last of his consecutive sentences. An "administrative discharge" allowed inmates to begin serving time on the last of their sentences while still permitting the Adult Authority to retain jurisdiction over the earlier terms (RT Vol. III, pp. 539-541; 556-557).

accordance with the "continuous term policy."[4/] (RT Vol. II, p. 272.)

Mr. Haygood was paroled on December 14, 1970. (Def. Trial Exh. N).

In January of 1972, Mr. Haygood was returned to San Quentin as a parole violator. He was again paroled on August 21, 1972 (Def. Trial Exh. N).

Subsequently, Haygood returned to prison in April of 1973, at which time the Adult Authority conducted a hearing and

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4. The "continuous term policy" refers t the provision that once a prisoner has received a sentence which is ordered to run consecutive to another term, none of the terms shall discharge until they all do. Thus, each of a prisoner's consecutive sentence are part of one single continuous term. Even though an inmate may have served all of this time on a particular sentence, it was still referred to in such situations because it continued to be a part of the whole. Referring to the terms did not mean that the Haygood served any more time in prison on these sentences (RT Vol. III, p. 521; Atty. Gen. Op. 51/162, Vol. 19, and Op. 56-59, Vol. 27).

revoked his parole and purported to refix his "C" and "D" terms at their maximum, which was life imprisonment (RT Vol. II, p. 272).

He was transferred to Folsom in December of 1973.

Soon after his arrival at Folsom, Mr. Haygood received a slip of paper from the Adult Authority notifying him of his legal status. Haygood said became upset with this form because he thought it indicated that he was still serving time on his "A" and "B" terms, as well as on his "C" term. Respondent also thought that the form indicated that he had not yet been credited with serving any time on his "D" term (RT Vol. II, p. 391).

Defendant Wipf was a Correctional Counselor I at Folsom State Prison.

Mr. Wipf met with respondent on at least five occasions and possibly more to discuss Mr. Haygood's concern about his

sentences. Mr. Wipf also discussed Haygood's concerns with petitioner Harold Cranke. Mr. Cranke was a Records Officer II at Folsom State Prison. (RT Vol. II, pp. 273-274).

On or about March 4, 1974, Mr. Haygood sent a letter to Mr. Cranke regarding his sentences. Mr. Cranke acknowledged receiving the letter. Mr. Cranke read the letter and then reviewed Haygood's prison central file, which included the legal status form, the cumulative case summary, the abstracts of judgment, and copies of the sentencing proceedings in respondent's case. Mr. Cranke determined that respondent's concerns about his sentence could best be answered by referring him to the continuous term policy which was set forth in two specific Attorney General's Opinions (RT Vol. III, pp. 588-590; 606; RT Vol. II, p. 274).

Defendant Joseph A. Spangler was the Administrative Officer of the California Adult Authority.

On March 8, 1974, Haygood sent a letter to Mr. Spangler. Mr. Seymour was directed to respond to the letter (RT Vol. II, pp. 274-275).

Petitioner Benjamin F. Seymour was a Records Officer III for the California Department of Corrections.

After receiving Haygood's letter dated March 8, 1974, Mr. Seymour reviewed Haygood's central file, including the cumulative case summary, legal status form, pertinent Attorney General opinions, and spoke with Mr. Cranke to confirm Mr. Haygood's legal status (RT Vol. III, pp. 612-614, 623-624; RT Vol. II, p. 275).

On April 1, 1974, Mr. Seymour sent a letter to Mr. Haygood answering the questions

which Mr. Haygood had asked about his sentences (Pl. Trial Exh. 9).

Respondent was not satisfied with either Mr. Cranke's or Mr. Seymour responses and on July 25, 1974, Mr. Haygood filed a pro per petition for a writ of habeas corpus in the California Supreme Court (Pl. Trial Exh. 15).

On August 8, 1974, an attorney was appointed to represent plaintiff in that habeas corpus action (RT Vol. II, p. 359).

On August 9, 1974, a return to the order to show cause was filed by the Warden of Folsom Prison denying the allegations of the petition.

On October 17, 1974, an amended petition was filed by the attorney representing Mr. Haygood, and on February 24, 1975, a supplemental return was filed (RT Vol. II, p. 360).

The question of the actual relationship between plaintiff's "C" and "D" terms was raised for the first time in this amended petition (RT Vol. II, p. 361).

In the case of In re Haygood (1975) 14 Cal.3d 801, the California Supreme Court determined that the Adult Authority's 1970 decision refixing Mr. Haygood's terms was erroneous and accepted Haygood's supplemental contention that the "D" term was consecutive only to the "A" and "B terms and was concurrent with the "C" term. The California Supreme Court therefore concluded that respondent's "C" term had expired on January 8, 1969 as a result of the Adult Authority's action, of October 8, 1970 fixing it at ten years. Based on the same action fixing the "D" term at five-and-one-half years, the "D" term was held to have expired in late 1968 because it commenced from the date respondent would otherwise have been

discharged from the "A" and "B" terms (which were the terms he was serving at the time of his escape). In essence, therefore, the Supreme Court reasoned that the Adult Authority's actions on October 8, 1970 effectively terminated all of Mr. Haygood's terms and he was entitled to be released by writ of habeas corpus (RT Vol. II, p. 361).

Respondent does not dispute the fact that he did not question the relationship between his "D" and "C" terms in any of the letters he sent to petitioners Cranke and Seymour in this action (RT Vol. II, p. 361, lines 13-15; lines 22-25; p. 362, lines 16-23)

Mr. Gaskill (a fellow inmate who advised Haygood) admitted that "the theory under which we went under [in the letters] was different than the theory the [California] Supreme Court rendered their opinion on." (RT Vol. II, p. 362.) Mr. Gaskill also admitted that "It was <u>just</u>

happenstance that the other attorney came up with the issue in which the Court rendered its decision on." (RT Vol. II, p. 362; emphasis added.)

In fact, Mr. Gaskill admitted that at the time when Mr. Haygood sent his letters to the prison officials, defendants, "No one knew" that the "D" term should not have been running consecutive to the "C" term (RT Vol. II, p. 364, Emphasis added).

The decision of the California Supreme Court in In re Haygood, supra, was not unanimous. At least one of the justices on the California Supreme Court felt that there was no error in the computation of Mr. Haygood's terms and that he was not entitled to be released from prison.

The above stated facts were undisputed prior to trial and remained that way after the trial. The only factual dispute in this case arose over the scope and

adequacy of the investigation undertaken by petitioners Cranke and Seymour in responding to respondent Haygood's letters.

REASONS FOR GRANTING THE PETITION

The long-awaited decision of the Ninth Circuit in this case was anticipated to resolve the question of whether Parratt v. Taylor, 451 U.S. 527 (1981) applies to due process claims involving liberty interests. The three-judge panel in Haygood had ruled that Parratt applies to liberty interests as well as property interests for purposes of a due process analysis.

Rather than follow the panel decision, a unanimous en banc panel instead ruled that Parratt was inapplicable under the circumstances presented in the instant case. By mistakenly concluding that Haygood's excessive incarceration was the result of "an established state procedure", the en banc

Court found that Haygood was denied his right to a pre-deprivation hearing under Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). The en banc Court also refused to accord petitoners the qualified immunity recognized in Harlow v. Fitzgerald, 457 U.S. 800 (1982).

The implications of the Haygood decision are potentially profound. Although the Ninth Circuit fell short of declaring that Parratt can not be applied to liberty interests, the dicta in the opinion clearly indicates that the Ninth Circuit views Parratt as applying only in a "narrowly limited class of cases." (769 F.2d at 1357)

In so holding, the Ninth Circuit has misperceived the import of Parratt and due process requirements in general. Indeed, the opinion reads as though the Court was attempting to find some rationale to support a predetermined result.

To reach this result and avoid the conclusion reached by the panel decision, the en banc court had to change the facts of the instant case to fit within Logan. To utilize Logan the en banc decision had to characterize the deprivation in this case as resulting from an "established state procedure." Such an analysis is both legally and factually incorrect.

In sharp contrast to Logan, it was the California Supreme Court's decision in Haygood which found that the complex web of sentencing statutes should properly be interpreted in a manner different from that utilized by petitioners. Thus, the California Supreme Court announced the proper method for computing Haygood's sentence for the first time. Petitioners merely misunderstood what even the Ninth Circuit conceded were complex statutes. This action could be considered no more than simple

negligence. Legions of cases establish that there is no constitutional right to error-free state action.

Even if analysis under Logan were proper, the Court of Appeal failed to consider all of the factors enunciated under that ruling. Under both Logan and Parratt, due process requirements are premised in part upon the burden that pre-deprivation process would impose upon the public entity and the practicality of such process. In the instant case, both factors mitigate against the pre-deprivation hearings now required by the en banc decision.

There is little or no doubt that a majority of California's prison inmates are unhappy about their confinement in one respect or another. The Haygood decision will now require some type of formal administrative hearing any time one of California's 40+ thousand inmates raise a

complaint concerning some aspect of their sentencing or confinement. This will place an intolerable fiscal and administrative burden on both state and local detention facilities that are already taxed beyond their capacities.

The Ninth Circuit decision ignores the vitality of Parratt in the civil rights area. This Court has made it clear that it views Parratt as a valuable tool to limit the ever-expanding range of cases filed under Section 1983. In Hudson v. Palmer, 104 S.Ct. 3194 (1984) for example, all nine justices agreed that Parratt extends to intentional conduct as well as negligent acts by state officials. The Ninth Circuit's decision in Haygood is precedent which will re-establish the federal courts in the ever-expanding business of trying ordinary tort cases.

I

THE NINTH CIRCUIT HAS CLEARLY ERRED BY REFUSING TO APPLY PARRATT V. TAYLOR TO A CASE INVOLVING NEGLIGENT INTERFERENCE WITH A LIBERTY INTEREST.

Petitioners contend that certiorari must be granted since the Ninth Circuit has clearly erred by refusing to apply this Court's holding in Parratt v. Taylor, 451 U.S. 527 (1981) to a situation involving the negligent deprivation of a liberty interest.

After six years of pretrial proceedings the sole claim presented to the jury in this case was whether petitioners had negligently violated plaintiff's due process rights by failing to adequately investigate his complaints concerning the computation of his sentence. Both the district court and the original panel decision of the Ninth Circuit understood this basic aspect of the case. The en banc court saw the case differently and instead held that petitioners

had acted pursuant to an established state policy. This finding is both crucial and erroneous.

A. The Ninth Circuit Mistakenly Found That Petitioners Had Acted Pursuant To An Established State Policy.

Contrary to the original panel decision which recognized that the gravamen of plaintiff's due process claim was the alleged inadequacy of petitioners' investigation of the complaints Haygood made concerning the computation of his sentence, the en banc Court instead held tha petitioners had acted pursuant to an established state procedure and had refused to afford plaintiff a pre-deprivation hearin in responding to his complaints about his sentence.

The en banc court made this abrupt change, in a rush to apply Logan v.

Zimmerman Brush Co., 455 U.S. 422, 435-437 (1982), to the instant case.

A finding that petitioners had acted pursuant to an established state policy is not supported by the record; is contrary to the findings made by earlier panel decision; ignores an unchallenged ruling of the District Court; and creates unnecessary Eleventh Amendment problems.[5/]

Unraveling the crucial question of whether petitioners acted pursuant to an established state policy or negligence requires an analysis of the events which led to Haygood's release from prison.

A close reading of the California Supreme Court's decision in In re Haygood,

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5. A finding that this case involves an established state policy creates liability for the state as an entity rather than for petitioners as individuals. An award of money damages against the state is expressly prohibited by the Eleventh Amendment. Edleman v. Jordan 415 U.S. 651 (1974).

supra, discloses that respondent was release from prison because prison officials had improperly determined in 1959 that his "D" term was consecutive to "C" term, as well as being consecutive to his "A" and "B" terms.

The California Supreme Court held that Haygood's "D" term was running consecutive to his "A" and "B" terms, but that his "D" term was concurrent with his "C" term. The facts are undisputed that the relationship between Haygood's "C" and "D" terms was originally established in 1959 when he returned to prison following his escape conviction. Neither petitioner played any part in the 1959 decision to run Haygood's "D" term conviction to both his "C" term and to his "A" and "B" terms. It is equally true that this error went unchallenged for more than 15 years.

Haygood did not begin to complain about his sentence until December of 1973

after he had been notified that his "C" and "D" terms had been refixed at life following a parole revocation hearing before the Adult Authority. Haygood then sent a number of letters to various prison officials including his correctional counselor, the Warden and petitioners Cranke and Seymour. All of Mr. Haygood's letters were investigated and answered in writing. At one point Haygood sent Mr. Cranke a fill-in-the-blanks letter which Mr. Cranke researched and answered.

It was uncontested that Haygood never asked petitioners any questions about the relationship between his "C' and "D" terms. Haygood was not satisfied with the responses he received and filed a pro per petition for a writ of habeas corpus with the California Supreme Court.

Even then Haygood did not complain that his "D" term should not be running consecutive to his "C" term as well as to his

"A" and "B" terms. Instead, Haygood simply challenged California's continuous term policy.

The actual problem with Haygood's sentence did not surface until an attorney was appointed to represent him in the California Supreme Court. Haygood was eventually released because of this newly discovered error.

When he filed his section 1983 action, plaintiff's claim for relief was directed at petitioners' negligence in failing to discover the error which was made in 1959. Simply stated, Haygood alleged that the two records officers were negligent in failing to uncover the true relationship between his "C" and "D" terms.

The Ninth Circuit appears to have confused California's 'continuous term policy' with an established state procedure which caused Haygood's unlawful confinement.

Application of the continuous term policy to Haygood's case did not cause Mr. Haygood to be confined too long.

In granting defendants motion to dismiss for failure to state a claim, the District Court specifically held that application of the continuous term policy to Haygood's sentence did not violate plaintiff's due process rights and therefore did not state a claim for relief. (CD 19, Order 1/5/78, p. 6-9). Respondent Haygood did not appeal the District Court's ruling that he was not harmed by application of the continuous term policy to his case.

B. Parratt v. Taylor Applies To Negligent Deprivations Of A Liberty Interest.

In Parratt v. Taylor, supra, this Court held that Nebraska's tort remedies for wrongful loss of a prisoner's hobby kit satisfied the due process requirement of the Federal Constitution.

Parratt v. Taylor, however, involve a deprivation of property -- not liberty. Circuit Courts are now in disarrary on the question of whether Parratt applies to deprivations of liberty interests and this court has decided to review the issue. Certorari has been granted in at least two cases which raise this precise issue. Compare Daniels v. Williams, 748 F.2d 229 (4th Cir. 1983) cert. granted 2/19/85 in No. 84-5872 and Davidson v. O'Lone 752 F.2d 817 (3rd Cir. 1984) cert. granted 6/3/85 in No. 84-6470; with Brewer v. Blackwell, 692 F.2d 387, 394-95 (5th Cir. 1982).

There are even conflicting authorities within the Ninth Circuit on this important issue. Thus, in Board of Regents 660 F.2d 1345, 1352 (9th Cir. 1981) (aff'd o other grounds sub nom. Kush v. Rutledge, 10 S.Ct. 1483 (1983)) the court held that Parratt applies and that there was no due

process violation. In Wakinekona v. Olim, 664 F.2d 708, 715 (9th Cir. 1981), rev'd on other grounds, 103 S.Ct. 1741 (1983) another Ninth Circuit panel held that Parratt does not apply and that a section 1983 cause of action is available.

The Ninth Circuit refused to apply Parratt to the facts of the Wakinekona case and in so doing pointed out that Justice Blackmun's concurrence, which Justice White endorsed, limited Parratt to property interests. See 451 U.S. at 545. However, such a limitation appeared neither in the Court's opinion, which commanded five votes in addition to those of Justices White and Blackmun, nor in Justice Stewart's concurring opinion. Furthermore, Justice Blackmun provided no rationale for the limitation he suggested. Nor did the Wakinekona court, which simply pronounced that cases "dealing with a liberty interest [are] of a wholly

different nature" than those involving property. 664 F.2d at 715.

The Fifth Circuit, which also refused to apply Parratt to liberty interests, relied on the narrow reading given to that case in Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-37 (1982), as well as on the citation in Logan to Justice Blackmun's concurrence in Parratt. 692 F.2d at 394-95; see 455 U.S. at 436.

Logan, however, presents an issue different from that involved in the instant case. In Logan, a charge was filed with the Illinois Fair Employment Practices Commissio alleging that an employer had wrongfully discharged Logan because of his physical handicap. At the time, the Illinois fair employment statute required that the Commission hold a factfinding conference within 120 days, which it failed to do for reasons beyond Logan's and his employer's

control. The Illinois Supreme Court held that the Commission's failure to convene the statutorily mandated conference in a timely manner deprived the Commission of jurisdiction and extinguished Logan's cause of action. It rejected his due process and equal protection arguments, finding that the procedures established by the statute were reasonable.

This Court reversed and concluded that due process required that:

> "[T]he Commission consider the merits of [Logan's] charge, based upon the substantiality of the available evidence, before deciding whether to terminate his claim . . . . A system or procedure that deprives persons of their claims in a random manner, as is apparently true of [the Illinois statute], necessarily presents an

unjustifiably high risk that meritorious claims will be terminated." (455 U.S. at 434-35.)

In Logan, this Court distinguished Parratt because Logan challenged "the 'established state procedure' that destroys his entitlement without according him proper procedural safeguards." Id. at 436. Logan's complaint was directed to a systemic procedural deficiency, not an unexpected or unperceived error. While the decision in Logan cited Justice Blackmun's concurrence in Parratt to support its position, nothing in the holding or analysis of Logan requires this Court to undermine Parratt by refusing to apply it to a negligent interference with a liberty interest.

The statute at issue in Logan was found to be deficient because it provided inadequate pre-deprivation process under circumstances in which such process was

feasible. It provides no guidance with respect to situations in which pre-deprivation process is not feasible.

Neither can it be argued that applying Parratt's reasoning to liberty interests would revive the requirement, rejected at least since Monroe v. Pape, 365 U.S. 167 (1961), that a section 1983 plaintiff must first exhaust state remedies. See 527 F.Supp. at 815. Such is clearly not the case. This objection amounts to a rejection of the reasoning of Parratt and has no greater force with regard to a liberty interest than to a property interest. Such a claim misperceives Parratt's rationale by confusing the rights accorded by the Fourteenth Amendment's due process clause with the remedy afforded by section 1983. The holding in Parratt did not deny the inmate a remedy; it defined his rights. The decision in Parratt does not require that

state remedies be exhausted. Instead, this Court held that no constitutional violation occurred and that resort to federal court i situations encompassed by its rationale is foreclosed.

Parratt must therefore be applied t situations in which process prior to the deprivation of a liberty interest would not be feasible or practicable. Where the deprivation is based on negligence, pre-deprivation due process is both in impractible and unfeasible. In such cases, it is the adequacy of the state's post-deprivation process which must be examined. In this context, distinctions between deprivations of property and those o liberty are of no legal moment.

The Ninth Circuit ignored this position, and focused instead on the rights guaranteed Haygood rather than the process available to him. The Ninth Circuit reasone

that since the state had lawfully confined Haygood without conducting a hearing, his due process rights had been violated.

This analysis if fatally flawed. It makes the deprivation itself the denial of due process. Such an analysis amounts to holding as a matter of law that a deprivation of liberty, i.e., a wrongful incarceration, is a per se violation of the Fourteenth Amendment without regard to whether the available process was adequate or inadequate, pre-deprivation or post-deprivation. That must not be allowed to become the law. The Fourteenth Amendment protects only against deprivations without due process of law. See Parratt, 451 U.S. at 537; Baker, 443 U.S. at 145. Section 1983 does not provide a cause of action for every tortious, wrongful or improper deprivation of either liberty or property by a state without regard to the process by which it is accomplished. The

Civil Rights Act is not an insurance policy against mistakes being made by persons acti under the color of state law. It only protects against mistakes being made in the absence of "due process."

C. Plaintiff Was Afforded Adequate Process.

It remains to be determined whethe the process accorded Mr. Haygood meets the constitutional standard of "due process." I the present case, Haygood was accorded substantial, but not mistake free, "process which commenced shortly after the date on which it was later determined that he shoul have been released. Thus, on October 8, 1970, Mr. Haygood had a hearing before the Adult Authority which fixed both his "C" ar "D" terms and set a parole date of December 14, 1970. As already pointed out, had plaintiff not violated his parole all o these terms would have discharged on July 8

1974. However, he twice violated his parole and it was finally revoked on December 13, 1973 following another hearing. Thereafter, plaintiff began writing letters to the defendants complaining about his sentence.

In these letters plaintiff insisted that he, in some fashion or other, was being required to serve more time than his sentences required. Petitioners answered each of Haygood's letters in writing as well as interviewing him. This, too, was a part of the "process" afforded plaintiff by the State of California. Additional "process" was provided by way of the habeas corpus proceedings which, unlike the earlier "process" Haygood received, achieved the result he sought -- his release from prison. Finally, a remedy under state tort law existed but Haygood failed to file a timely claim and forfeited this "process."

The panel decision found this arra of "process" to be sufficient to meet the constitutional requirement of due process.

Arguably, the "process" which Haygood received can be said to have commenced before the deprivation of his liberty and to have continued thereafter. any event, it was a continuous process that was responsive to the rules of the Adult Authority as the officials then understood them, as well as to Haygood's numerous complaints. When these facts are realized, the true nature of this case becomes clear. It is simply an instance in which the prope authorities understood California law regarding indeterminate sentences in a fashion subsequently determined to be incorrect by the State Supreme Court on a six-to-one vote. None of Mr. Haygood's liberty interests were stripped from him without due process. Scrupulous care was

taken to insure that he received all available process. That which was utilized post-deprivation was not feasible before the deprivation. The fact that the process was lengthy does not make it constitutionally inadequate in this setting, nor does the fact that relief awaited a decision by the state court of last resort. In the words of Judge Sneed "arguing that processes that ultimately vindicated the claim asserted are constitutionally deficient is surprising, if not perverse."

* * * * *

II

THE NINTH CIRCUIT ERRED IN REJECTING PETITIONER'S CLAIM THAT THEY WERE PROTECTED FROM LIABILITY BY A QUALIFIED IMMUNITY.

Prior to trial, petitioners filed number of motions, both to dismiss and for summary judgment alleging that they were protected by a qualified immunity. The district court repeatedly rejected this argument and treated the issue as a questio of fact rather than as a legal issue. With only a cursory analysis of this important issue, the en banc decision of the Ninth Circuit rejected petitioners' claim that th were protected by a qualified immunity as a matter of law.

The Ninth Circuit's en banc opinio ignores the teaching of this Court in Harlo v. Fitzerald 457 U.S. 800 (1982) that good faith is an objective determination that mo often is a question of law, not fact.

Harlow, supra also instructs that individual liability will not attach under section 1983 unless the individual acts to deprive the prisoner of a "clearly established" constitutional right. Given that Mr. Haygood's "liberty" interest was not defined until the California Supreme Court unraveled his complex sentencing quagmire, it defies logic and law to assert that Haygood's right to an earlier release was clearly established.

Under Davis v. Scherer, 468 U.S. ____, 104 S.Ct. 3012 (1984) petitioners enjoy a qualified immunity unless, at the time Mr. Haygood complained to them about his sentence it was "clearly established" that his sentence had been miscalculated. The standard is objective and is appropriate for summary disposition by a trial judge. Harlow v. Fitzgerald, supra. This Court has stated that it views the "objective reasonableness

of [the] official's conduct as measured by reference to clearly established law." Davis, 468 U.S. at ____, 104 S.Ct. at 3018 (quoting Harlow, 457 U.S. at 818, 102 S.Ct. at 2738).

The Ninth Circuit, however, merged the question of "deliberate indifference" with the question of whether a right is "clearly established" for qualified immunity purposes. This incorrectly inserts a subjective element into the determination of an official's immunity. It also transforms qualified immunity from a question of law to a factual inquiry for the jury.

There is no definitive guide as to when a right is "clearly established". Zweibon v. Mitchell, 720 F.2d 162, 168-69 (D.C. Cir. 1983). This Court has indicated that a high standard should be applied in prison cases such as this. In Davis, the Court recognized that prison officials

routinely make close decisions and that they "should not err always on the side of caution." Davis, 468 U.S. at ____, 104 S.Ct. at 3021. Those persons "must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office." Id.

In the instant case, the lower courts have stripped these two prison officials of their right to a qualified immunity in violation of established precedent. In the event this Court approves of the Ninth Circuit's interpretation of Parratt and reaches the immunity issue, it nevertheless should grant review and reverse the en banc circuit court decision to rectify this clear error.

The Ninth Circuit appears to have concluded that a jury's finding that prison officials violated an inmate's due process and Eighth Amendment rights necessarily would

negate any claim that the officers acted in good faith and were entitled to a qualified immunity. In a similar case which is presently before this court on certiorari, the Ninth Circuit has held:

> The two findings are mutually exclusive. "Those 'deliberately indifferent' to the [plaintiff's right] . . . could not show that they had not violated 'established statutory or constitutional rights of which a reasonable person would have known.'" Haygood v. Younger, 718 F.2d at 1483-84. See Miller v. Solem, 728 F.2d at 1025. Similarly, deliberate indifference to Albers' right to be free of cruel and unusual punishment would violate a right "clearly established at the time of the conduct at issue." Davis v. Scherer, 468 U.S. ____, ____, 104

S.Ct. 3012, 3021, 82 L.Ed. 139 (1984). Albers v. Whitley, 743 F.2d at 1376 cert. granted 6/10/85 in No. 84-1077.

The principal flaw in this reasoning, of course, is that the prison officials did not have the benefit of the California Supreme Court's 1975 ruling when they acted upon Haygood's complaints in 1974.

In Procunier v. Navarette, 434 U.S. at 565, this Court ruled that a claim of qualified, "good faith" immunity by prison officials could not be rejected as a matter of law, "[b]ecause they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared. . . ." Drawing on this precedent, the Court stated in Harlow v. Fitzgerald, 457 U.S. at 818, that "government officials are shielded from liability for civil damages

insofar as their conduct does not violate violate clearly established statutory or constitutional rights of which a reasonable person would have known." As this Court explained,

> [i]f the law at [the time an action occurred] was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful.

Ibid.

Furthermore, the good faith defens available to each petitioner does not distinguish between mistakes of law and tho of fact (Benson v. Hightower (9th Cir. 1980 633 F.2d 869).

In analyzing the availability of t qualified immunity defense, the Ninth Circu

failed to focus on whether, in the context of responding to an inmate's complaints about his sentence, prisoners had a clearly established constitutional right to receive an administrative hearing on their complaint concerning their sentence. Assuming for the sake of argument that the Ninth Circuit correctly concluded that petitioners failed to adequately investigate Haygood's complaints by not affording Haygood a hearing, this requirement was not clearly established when the two records officers responded to Mr. Haygood's complaints in this case. Until the Ninth Circuit's decision in this case, no other circuit court had enunciated a rule requiring due process hearings for prisoner complaints about their sentences.

* * * * *

III

THE NINTH CIRCUIT ERRED IN IGNORING PETITIONERS ARGUMENT THAT ANY AWARD OF ATTORNEY'S FEES UNDER 42 U.S.C. SECTION 1988 MUST BE PROPORTIONATE TO THE RECOVERY IN ORDER TO BE REASONABLE, AND THAT THE ATTORNEY'S FEE CLAIM IN THIS CASE IS EXCESSIVE.

It is petitioners contention that certiorari must also be granted in this cas to review the important question of whether awards of attorney's fees under 42 U.S.C. § 1988 must be proportionate to the jury's verdict in order to be reasoanble. It is petitioners contention that an award of mor than $45,000.00 in fees for a $2,000.00 judgment is inherently reasonable since it grossly disproportionate to the jury's verdict.

In the instant case, plaintiff originally named 16 defendants and alleged approximately 19 separate causes of action.

After six years of pretrial proceedings, only five defendants remained. Defendants were successful in obtaining either summary judgments or outright dismissals with respect to all but two of plaintiff's claims.

At trial, three defendants were granted a non-suit and the jury eventually awarded plaintiff a meager $1,450.00 in general damages against one defendant and $640.00 against another.

Plaintiff then filed a request for attorney's fees in the amount of $57,731.25 and paralegal fees of $18,187.50 for a total requested award of $75,918.75.

In awarding plaintiff more than $45,000.00 in fees, the district court applied the 12 factors set forth in Fountila v. Carter, 571 F.2d 487 (9th Cir. 1978). One of the factors evaluated by the court was the total number of hours expended on the case.

Here, plaintiff's attorney asked to be compensated for all of the 728.75 hours he spent on the case from 1975 until 1981. Th district court found this request to be reasonable and only reduced the number of hours by 10% to compensate for counsel's inappropriate method of keeping records.

Over petitioners' objections, the District Court compensated Mr. Haygood for all of the time his counsel spent on the case, even for the time spent opposing the summary judgments and dismissals which were granted for 11 out of the original 16 defendants, and for 17 of the 19 original claims.

Because of counsel's ineffectiveness, the district court further held that "the skill displayed by counsel, most importantly the amount and the result obtained by counsel would in themselves lea me to reduce the loadstar figure by 65%.

However, the District Court also increased the award by 35% because of the novelty and difficulty of the issues and because of the protracted nature of the litigation. These computations led to a net 30% reduction of the fee request. However, the total award of $45,383.17 was never analyzed to determine whether it was proportionate to the result obtained.[6/]

It is petitioners' contention that unless this Court intends to allow section 1988 to become the tail that wags the dog, there must be a requirement of proportionality between the amount of the judgment and the amount of attorney's fees awarded in such cases.

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6. In supplemental requests for attorneys fees filed in the North Circuit and in the District Court, respondent is seeking an additional $13,303.00 which, if granted, would escalate the award in this case to $58,686.17.

The instant case was and continues to be basically a tort action for money damages. The gravamen of plaintiff's complaint was that petitioners were negligent in their investigation of his complaints concerning his sentence. There was no declaratory relief nor was there any injunctive relief. The case did not establish any significant precedent in the area of California sentencing law. The only notoriety the case has achieved resulted from the district court's refusal to apply Parratt to plaintiff's due process claim.

This Court's decision in Hensley v. Eckerhart, 461 U.S. 424 (1983) was a step in the direction of requiring that attorney's fees be proportional to the judgment in money damage cases. In Hensley this Court remanded the case back to the district court with orders that the lower court reconsider the amount of the attorney's fee award in light

of the extent of success achieved by the plaintiffs.

In Hensley, this Court acknowledged that section 1988 was enacted "to ensure effective access to the judicial process for persons with civil rights grievances." Hensley v. Eckerhart, supra, at 429. Similarly the legislative history which led to the enactment of section 1988 evidences a clear intent that the section was not meant to produce awards which were so large as to produce windfalls to attorneys S. Rep. No. 94-1011, p. 6 (1976), H.R. Rep. No. 94-1558, p. 9 (1976).

The rationale behind the Hensley decision was not applied to the instant case. Instead, the district court applied the criteria set forth in Fountila v. Carter, supra, without ever taking an overall look to see if the award was proportional to the judgment.

Even, Hensley, however, did not go far enough. Thus, Justice Rehnquist has observed in his in-chambers opinion in City of Riverside v. Rivera that:

> This Court has already recognized that "[t]he product of reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" Hensley, supra, at 434. Similarly, in Blum v. Stenson, ____ U.S. ____, 104 S.Ct. 1541 (1984), we explained that "there may be circumstances in which the basic standard of reasonable rates multiplied by reasonably expended hours results in a fee that is either unreasonably low or

unreasonably high." Id. at ____, 104 S.Ct. at 1548. Neither Hensley nor Blum, however, addressed whether disproportionality between the amount of the monetary judgment obtained and the amount of the attorney's fee, standing alone, is a consideration that might properly lead a court to reduce the fee. In-chambers opn. J. Rehnquist, City of Riverside v. Rivera, 106 S.Ct. 5 (1985).

The fees awarded in the instant case are even more shocking than those awarded in City of Riverside v. Rivera, supra.

Thus, in its 1984 report to Congress, entitled "Civil Rights Attorney's Fees Awards Act of 1976, the National Association of Attorneys' General (hereinafter NAAG Rpt.) singled out the instant case and Rivera v. City of Riverside, 679 F.2d 795 (9th Cir. 1982), as

examples of situations where an attorney's fee award was "grossly disproportionate to the degree of success" obtained by the plaintiff. In comparing the two awards, the NAAG Report found the instant case to be "an even more extreme example of a court's failure to proportion a fee award to the degree of success obtained. . . ." (NAAG Rpt., p. 19.)

Petitioners have raised the disproportionality issue at every stage of the proceedings. For example, petitioners opposed plaintiff's original request for fees as disporportionate to judgment.

Citing Larson, Federal Court Awards of Attorney Fees, 1981, p. 121, and Manhart v. City of Los Angeles (9th Cir. 1981) 652 F.2d 904, 907, the district court rejected petitioners' argument and held that "as a general matter, a low monetary recovery is

irrelevant to the proper computation of fee awards." (Order, 3/25/82, p. 5.)

The issue was then raised in petitioners' appeal to the Ninth Circuit and was also argued to the en banc panel. The en banc decision of the Ninth Circuit totally ignored this important issue.

If a proportionality requirement is not imposed, this Court's recent holding in Kentucky v. Graham, ___ U.S. ____ (1985) could have devastating consequences for public employees who are not protected either by insurance or by an indemnification provision such as California Government Code section 825.[7/]

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7. Petitioners Cranke and Seymour are protected by the indemnification provisions of California Government Code section 825. There are, however, no funds appropriated to satify attorneys' fee claims in California. Collection of this and other section 1988 awards could well depend in the first instance on the cumbersome and cruel process of executing against the personal assets of these two state employees.

Section 1988 was not intended to be a license for the federal courts to raid state treasuries or bankrupt state employees. This is why the Congress limited the fees which may be awarded to those which are reasonable. It is petitioners' contention that in order to be reasonable, fees must be proportionate to the recovery which plaintiff secured and that when the fees awarded are totally out of proportion to the jury's verdict, the award is inherently unreasonable.

* * * * *

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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WGP:jsi

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK HAYGOOD,	)	DC No.
	)	CV-S-75-738-LKK
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
EVELLE J. YOUNGER, et al.,	)	
	)	
Defendants,	)	
	)	
and	)	
HAROLD CRANKE and	)	O P I N I O N
BENJAMIN SEYMOUR,	)	
	)	
Defendants-Appellants.	)	

Appeal from the United States District Court for the Eastern District of California, Lawrence K. Karlton, Jr., District Judge, Presiding
Argued en banc and submitted July 11, 1984

Before: BROWNING, Chief Judge, and GOODWIN, HUG, TANG, SKOPIL, SCHROEDER, FARRIS, ALARCON, FERGUSON, CANBY and REINHARDT, Circuit Judges

GOODWIN, Circuit Judge

Two prison officials appeal a judgment for $2,090 in damages and $45,383 in attorneys' fees in Frank Haygood's § 1983

action for damages for prolonging his state prison detention by using an incorrect method to compute his release date. Haygood v. Younger, 527 F.Supp. 808 (E.D. Cal. 1981). Our panel decision reversed that judgment. Haygood v. Younger, 718 F.2d 1472 (9th Cir. 1983), withdrawn, 729 F.2d 613 (9th Cir. 1984). Because this case presents important questions about the scope of due process available to state prisoners, we took it with two others for en banc reconsideration.[1]

The law in this circuit and elsewhere is controlled by the Supreme Court opinions in Parratt v. Taylor, 451 U.S. 527 (1981), Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), and Hudson v. Palmer, ____ U.S. ____, 104 S.Ct. 3194 (1984). Those

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1 This case was heard along with Piatt v. MacDougall, 723 F.2d Adv. Sh. 721 (9th Cir.), withdrawn, 729 F.2d 613 (9th Cir. 1984), and Bretz v. Kelman, 722 F.2d 503 (9th Cir. 1983), withdrawn, 729 F.2d 613 (9th Cir. 1984).

three cases shed recent light upon any analysis of claims under § 1983. Haygood's particular injury and the process the state provided, although unusual, do not require a departure from settled precepts of § 1983 analysis.

Background

Frank Haygood, after spending more than twenty years in California prisons, obtained his freedom by bringing a habeas corpus action in state courts. In re Haygood, 14 Cal.3d 802, 122 Cal. Rptr. 760, 537 P.2d 880 (1975). In that action, Haygood challenged the formulae by which the California Adult Authority calculated his prison sentence under California's continuous term policy.[2] The problem arose because of

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[2] Until 1977, California had an indeterminate sentencing law under which a prisoner's specific sentence would be determined by the California Adult Authority within limits set by law. At the time, the state's continuous term policy required that,

an ambiguity between two California statutes with respect to when Haygood's term for escape could commence.

While serving two terms for previous convictions, Haygood escaped from prison and subsequently committed a robbery. He was first tried for and convicted of the robbery and after that the escape. Section 669 of the California Penal Code provided that where a defendant is convicted of two crimes, the second sentencing judge has discretion to make the terms of the two convictions concurrent or consecutive. Cal. Penal Code

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when a prisoner had two or more terms which were ordered to be served consecutively, they would become one continuous term in which none of them would be discharged until all were discharged. See Cal. Penal Code § 1168 (West 1970).

All References to the California Penal Code herein are to the Code in effect at the time of Haygood's sentencing in 1959 or at the time of the California Supreme Court decision in 1975. Several sections cited have since been repealed or significantly amended.

§669 (West 1956). See In re Haygood, 537 P.2d at 885 n.7. Relying on this provision, the Adult Authority believed Haygood's escape term to be consecutive to his robbery term and did not fix his escape term to begin until after his robbery term had expired. See Cal Penal Code § 3021 (West 1956).

The California Supreme Court found that this determination by the Adult Authority was incorrect. At the time of Haygood's escape, § 4351 of the Penal Code required that an escape term commence at the time the escapee would have been discharged from the terms he was serving had he not escaped. Cal. Penal Code § 4531 (West 1956). The court found that this provision prevailed over the general provisions of § 669 and thus Haygood's escape term could not be consecutive to his robbery term, but only to the two terms he was serving at the time of his escape. Because these two terms had both

expired by March 14, 1963, Haygood's escape term could not be fixed as commencing after the end of Haygood's robbery term in 1970 (retroactively to January 8, 1969). Haygood thus should have been discharged at the end of his robbery term under § 2940 of the Penal Code.[3]

The panel opinion sets forth the details of Haygood's dispute with the state prison system. Haygood, 718 F.2d at 1474-78. We need not repeat those details here, beyond noting that in March 1974 Haygood wrote the

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[3] Section 2940 of the California Penal Code specified:

> Where the Adult Authority is authorized to fix and refix the term of imprisonment of a prisoner, such prisoner shall be discharged from custody upon the completion of said term so fixed or refixed and if the Adult Authority fails to fix the term of imprisonment the prisoner shall be discharged upon the completion of the maximum punishment provided by law for the offense for which the prisoner was convicted. Cal. Penal Code § 2940 (West 1956) (repealed 1977).

warden a letter questioning the running of his sentence for robbery. He demanded that he be released. The letter was investigated by the two defendants who then were employed as Records Officer II and Records Officer III. Their written answer to Haygood explained that, according to the relevant statutes, he correctly was being held to start his escape sentence after he completed his robbery sentence. They attached to their routing slip to Haygood a copy of an attorney general's opinion that they believed to be supportive of their letter. It does not appear from the record that Haygood then demanded or was offered an administrative hearing.

In due course Haygood brought habeas corpus proceedings in the state courts. The errors in Haygood's sequence of serving the various sentences did not become manifest until after the California Supreme Court had

subjected a complex web of sentences, statutes and regulations to sophisticated scrutiny. In re Haygood, 537 P.2d at 884-87. After Haygood's release from prison in 1975, he brought this action in federal court under 42 U.S.C. § 1983, alleging that more than a dozen state officers had deprived him of his liberty without due process of the law and subjected him to cruel and unusual punishment in violation of the Eighth Amendment.

On pretrial motions, the claims against the state attorney general, the nine members of the California Adult Authority, and the director of the state department of corrections were dismissed. At the close of the plaintiff's case, the trial judge directed verdicts in favor of the warden of Folsom prison, the administrative officer of the Adult Authority, and the correctional counselor. The case went to the jury on the claims against Records Officers Cranke and

Seymour. The jury found these remaining defendants liable for depriving Haygood of his constitutional rights. There is no cross-appeal, and consequently no question before us on the reduction of the number of defendants in the case.

Appropriateness of § 1983

In any § 1983 action, the first question is whether § 1983 is the appropriate avenue to remedy the alleged wrong.[4] We

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[4] An alternative remedy for damages was available to Haygood. California state law provides an action in tort for prisoners whose release is unlawfully delayed. See e.g., Jackson v. City of San Diego, 121 Cal. App.3d 579, 588; 175 Cal. Rptr. 395, 400 (1981) ("A person kept in custody after his jail term expires is entitled to redress for damages for false imprisonment even where the incarceration starts in a lawful manner"). See also Sullivan v. County of Los Angeles, 12 Cal.3d 710; 117 Cal. Rptr. 241, 527 P.2d 865, 869 (1974); Shakespeare v. City of Pasadena, 230 Cal.App.2d 375; 40 Cal. Rptr. 863, 869-70 (1964). Haygood is not, under present federal law, required to have explored state remedies before proceeding under § 1983 to seek compensation for alleged constitutional injury. Monroe v. Pape, 365 U.S. 167 (1961).

reach the issue of these defendants' § 1983 liability only if we find that the two essential elements to a § 1983 action are present: (1) the defendants acted under color of law, and (2) their conduct deprived Haygood of a constitutional right. 42 U.S.C. § 1983.

We need not be detained by the requirement that the defendants acted under color of state law. The defendants' conduct was under color of law. The officers were clothed with the legitimacy of the government and were purporting to act thereunder. Monroe v. Pape, 365 U.S. 167, 172-87 (1961). It is not necessary to show that these officers were acting specifically within the scope of their authority because negligent abuse of authority by state officials can form the basis for a § 1983 cause of action. Parratt, 451 U.S. at 534-35. Intentional acts by state officials, even if committed

without specific authority can satisfy the color of law requirements of § 1983, Hudson, 104 S.Ct. at 3202, as can conduct pursuant to established policy, Logan, 455 U.S. at 435-37, and errors by individual officers in the absence of an affirmative government policy. Baker v. McCollan, 443 U.S. 137, 146 (1979). Cf. Monell v. Dep't of Social Services, 436 U.S. 658, 694 (1978); Wolf-Lillie v. Sonquist, 699 F.2d 864, 870 (7th Cir. 1983).

Our inquiry thus will focus on the second element of a § 1983 cause of action. Assuming that Haygood suffered an injury under color of law, that injury is cognizable under § 1983 if the right affected is one guaranteed by the constitution. Baker, 443 U.S. at 142.

Liberty is protected from unlawful state deprivation by the due process clause of the Fourteenth Amendment. Haygood alleges

that the defendant state officials deprived him of liberty by wrongfully keeping him in custody from 1970 to 1975. Although Haygood's sentence expired in 1970, the Adult Authority did not release him until ordered to do so in 1975 by the California Supreme Court. As the district court noted, the state lost its power to hold Haygood in 1970; any continued detention deprived him of his rightful liberty. McNeil v. Director, Patuxent Institution, 407 U.S. 245, 246 (1972). See Haygood, 527 F.Supp. at 813.

Eighth Amendment Theory

Haygood's first theory of liability is that his unlawful incarceration constituted cruel and unusual punishment in violation of the Eighth Amendment.

Detention of Haygood beyond the termination of his sentence was undoubtedly punishment within the constitutional meaning of that term. Bell v. Wolfish, 441 U.S. 520,

535-40 (1979). To be cruel and unusual, punishment must be incompatible with "the evolving standards of decency that mark the progress of a maturing society," Trop v. Dulles, 356 U.S. 277 (1983). Detention beyond the termination of a sentence could constitute cruel and unusual punishment if it is the result of "deliberate indifference" to the prisoner's liberty interest, see Estelle v. Gamble, 429 U.S. 97, 104-06 (1976); otherwise, such detention can be held to be unconstitutional only if it violates due process. Wolfish, 441 U.S. at 535 n.16.

The panel opinion held that the deliberate indifference standard requires a finding of some degree of individual culpability. Haygood, 718 F.2d at 1482 & n.2. The district judge gave the following instruction, with which the defendants agreed:

> In order to find plaintiff has been subjected to cruel and unusual punishment you must find that defendants, or any of them, by their actions intended to punish plaintiff and that this punishment violated the basic prohibition against inhuman treatment.

This imposed a more stringent standard of "an intent to punish" Haygood by retaining him beyond the termination of his sentence. On motion for judgment notwithstanding the verdict, the district judge emphasized three times in his opinion that there was sufficient evidence from which the jury could have found that Cranke and Seymour intended to punish Haygood by their actions, 527 F. Supp. at 819, 821-22. However, the district judge went on to explain his view that, on reflection, he no longer thought that it was necessary to prove that the defendants intended to inflict the additional imprisonment, but that "to the extent that the defendants caused such an injury to the

plaintiff, they were liable to him under section 1983." 527 F. Supp. at 822. In effect, the district judge was pointing out in dictum that the instruction he had given imposed a stricter standard of proof than he believed necessary, but that there was sufficient evidence to uphold the verdict, even under the stricter standard requiring intentional conduct.

The panel opinion disagreed with the dictum of the district court and held that "'cruel and unusual' requires a degree of culpability on the part of state officials." 718 F.2d at 1482. The panel found, and we agree, that the degree of culpability required is "deliberate indifference."

As the district court noted, "[T]he plaintiff presented credible evidence that the defendants, after being put on notice, simply refused to investigate a computational error." Haygood, 527 F. Supp. at 823. Thus,

there was adequate evidence from which the jury could have found liability under the appropriate standard of "deliberate indifference" and we need not determine whether the district court was correct in concluding there was sufficient evidence to support a finding of liability under the more stringent standard of actual intent.

Due Process Theory

Haygood's second theory of liability requires a more probing examination. He alleges that the illegal incarceration deprived him of liberty without due process of law, in violation of the Fourteenth Amendment.

False imprisonment or deprivation of liberty is not per se unconstitutional merely because the defendant is a state official. Baker, 443 U.S. at 146. Similarly, the Fourteenth Amendment does not guarantee state prisoners a particular method of calculating

prison sentences. See Wolff v. McDonnell, 418 U.S. 539, 557 (1974). But when the state itself creates a statutory right to release from prison,[5] the state also creates a liberty interest and must follow minimum due process appropriate to the circumstances to ensure that liberty is not arbitrarily abrogated. Vitek v. Jones, 445 U.S. 480, 488-89 (1980). See Mechum v. Fano, 427 U.S. 215, 226 (1976). Therefore, if the officials made their calculations in a manner which denied Haygood his statutory right to liberty without due process of law, a constitutional violation exists and a cause of action is available under § 1983. The question, thus narrowed, is whether the defendants denied Haygood due process of law.

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5 See Cal. Penal Code §§ 669, 2940, 3021, 4531 (West 1956). For a discussion of the interaction in these statutes and the proper statutory construction, see In re Haygood, 537 P.2d at 882-85.

Adequate, or due, process depends upon the nature of the interest affected. See Morrissey v. Brewer, 408 U.S. 471, 481-82 (1972). The more important the interest and the greater the effect of its impairment, the greater the procedural safeguards the state must provide to satisfy due process. Id. at 481.

This circuit has not spoken with one voice on whether the taking of liberty demands inherently greater process than the taking of property. Compare Wakinekona v. Olim, 664 F.2d 708 (9th Cir. 1981), rev'd on other grounds, 461 U.S. 238 (1983) (liberty and property demand different process) with Rutledge v. Arizona Board of Regents, 660 F.2d 1345 (9th Cir. 1981), aff'd on other grounds sub nom, Kush v. Rutledge, 460 U.S. 719 (1983) (liberty and property are the same). There is also a division among other circuits on this issue. See, e.g., Parratt,

451 U.S. at 545 (Blackmun, J., concurring); Patterson v. Coughlin, 761 F.2d 886, 890, (2d Cir. 1985) (procedural safeguards for liberty must be "at least equal" to those for property); Shelton v. City of College Station, 754 F.2d 1251, 1257 (5th Cir. 1985), reh'g pending, 765 F.2d 456 (5th Cir. 1985) (Parratt rules do not apply to deprivations of liberty); Wilson v. Beebe, 743 F.2d 342 (6th Cir. 1984) (life and liberty inherently more important than property); Thibodeaux v. Bordelon, 740 F.2d 329 (5th Cir. 1984) (liberty and property not doctrinally distinct); Daniels v. Williams, 720 F.2d 729 (4th Cir. 1983) (liberty and property are similar), aff'd on reh. 748 F.2d 229 (4th Cir. 1984), cert. granted, 105 S.Ct. 1168 (1985); Wolf-Lillie v. Sonquist, 669 F.2d 864 (7th Cir. 1983) (treat liberty and property similarly).

While some judges have perceived in specific cases some rhetorical dichotomy between liberty and property, we believe that the inquiry more appropriately focuses on the gravity of the effect of government conduct on protected interests. All denials of life, liberty or property will fall somewhere on a continuum between relatively minor effects on nonconstitutional interests at one end, and the loss of life at the other. On that continuum, we recognize that a denial of liberty will often have a more grave effect upon the victim than will a deprivation of property. Without categorizing an interest as liberty or property, the Supreme Court in Mathews v. Eldridge, 424 U.S. 319 (1976), called for a balancing to determine what process is due. Mathews teaches that it is necessary to weigh the risk of an erroneous deprivation, the state's interest in providing (or not providing) specific

procedures, and the strength of the individual's interest. Id. at 335; Cleveland Board of Education v. Loudermill, ___ U.S. ___, 105 S. Ct. 1487, 1494 (1985).

No one suggests that Haygood's five extra years in prison were de minimis. At least 17 months of his extra time were spent after his protests and demands were known to these defendants. On the continuum from minor to major effects on protected interests, Haygood's loss of liberty falls among the major deprivations. In light of Mathews, (social security) and Morrissey (parole revocation) due process in this case required the state to provide Haygood with a meaningful hearing at a meaningful time. Mitchell v. W. T. Grant Co., 416 U.S. 600, 611 (1974); Armstrong v. Manzo, 380 U.S. 545, 552 (1965). See Ingraham v. Wright, 430 U.S. 651, 674 (1977).

Deciding that due process required the state to provide Haygood with a meaningful hearing does not end our inquiry into whether he suffered a constitutional deprivation. We must next decide whether the hearing should have been provided at an earlier date than the hearing he eventually received in response to his state habeas corpus action.

In Parratt, Logan, and Hudson, the Supreme Court used the terms predeprivation and postdeprivation process to refer to hearings provided before and after the state's incursions against interests in liberty or property. By this shorthand, the court distinguished between that preventive process which must be provided before, and that remedial process in lieu thereof which constitutionally may be provided after a denial of recognized rights.

In the context of random, unauthorized constitutional torts, this shorthand is useful. See Parratt, 451 U.S. 527; Daniels, 748 F.2d 229. When we speak of a denial of liberty by official state policy or procedure, however, it is confusing and perhaps meaningless to speak of predeprivation or postdeprivation due process, because if a challenged loss of liberty was preceded by a due process hearing, there has been no constitutional deprivation. Process which precedes a loss of liberty obviously prevents a constitutional violation. Process which follows the loss of liberty can only provide a substitute remedy, usually money damages.

As Parratt and Hudson make clear, random and unauthorized deprivations of property by state prison officers, because they are random and unauthorized, cannot be prevented by due process hearings. This is

the rationale for Parratt's rule that a remedial hearing after the injury can provide due process in a narrowly limited class of cases. Parratt and Hudson did not decide, and we do not reach the question, whether the availability of some remedial relief in state court might be imposed as a bar to federal relief under § 1983 in the myriad fact situations that might present themselves in other cases against state and local government officials. Parratt and Hudson dealt with relatively minor infractions of prisoners' interests in their personal property, and did not deal with official assaults, batteries or other invasions of personal liberty. Cf. Wilson v. Garcia, ___ U.S. ___, 105 S. Ct. 1938, 1940 (1985).

Moreover, where the injury is the product of the operation of state law, regulation, or institutionalized practice, it is neither random nor unauthorized, but

wholly predictable, authorized, and within the power of the state to control. In such cases, the state may not take away the protected interest without a hearing in advance of the injury. Logan, 455 U.S. at 436. The state, in Logan, had destroyed the plaintiff's property interest in employment by failing to convene a hearing within the time mandated by the same statute that had created the interest. The Supreme Court noted that Logan was not challenging the commission's error, but was challenging the established state procedure itself which destroyed his rights without giving him an opportunity to be heard.

It is not every erroneous administration of state law that results in a denial of due process. For example, an innocent person can be imprisoned following a trial in which due process was scrupulously observed. Haygood argues that the denial of

liberty without due process occurs when a prison term is extended or a release date bypassed without a hearing. When the federal court balances the individual's liberty interest against the state's interest in the efficient administration of its indeterminate sentence scheme, the balance weighs heavily in favor of liberty. In the balancing process, the specific dictates of due process generally require consideration of three factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. Mathews, 424 U.S. at 335. As the

court observed in Logan, absent the necessity of quick action by the state or the impracticability of providing any preventive process, a remedial hearing would be constitutionally inadequate. 455 U.S. at 436, citing Parratt, 451 U.S. at 539.

In the context of the facts of the case at bar, Haygood served most of his time in custody executing sentences pronounced by courts exercising the essence of due process of law. Haygood continued to serve time in custody after his correct release date had passed because his keepers did not believe that he was entitled to be released. Whether this behavior on the part of his keepers was negligent or intentional, Haygood's keepers knew that he was protesting his retention in custody. The officers believed that their understanding of the statutes was superior to his. Haygood's response was habeas corpus. This took time. In the ordinary course of

state court litigation, Haygood established, nearly five years after he should have been released and 17 months after his protests were known, that his view of the matter was more nearly correct that was that of his keepers.

The record in Haygood's case revealed that he had been afforded due process before each of his sentences was imposed. Thus he was properly convicted of escape, and properly sentenced. The denial of due process occurred when state officers, through established interpretations of the regulations for setting release dates, without affording Haygood an opportunity to be heard, chose to extend his custodial period. This de facto government policy gave rise to a § 1983 claim against Records Officers Cranke and Seymour approximately seventeen months before Haygood's litigation established the proper release date. When

Haygood finally, by means of habeas corpus, came before the state Supreme Court, he obtained the judgment holding that he should have been released five years earlier. This was remedial, or postdeprivation, relief in part at least, but it did not satisfy the Logan, Morrissey, and Mathews line of cases that require a hearing before the rights are taken away. For these reasons, we hold that Haygood has stated a § 1983 claim for damages for denial of liberty without due process of law. The remaining question is whether the defendants still in the case had a qualified immunity defense as a matter of law, or whether a triable issue of fact remained to be resolved.

There was no affirmative state regulation which required the defendants here to calculate Haygood's prison term in the manner they chose. Their conduct was not, therefore, mandated by law. Rather, the

prison officials' actions were part of a continuous process that was responsive to the Adult Authority policies. The Adult Authority has been released from the case. The two clerical defendants remaining in the case employed formulae, provided by their superiors, to calculate Haygood's term. And, while those formulae were not mandated by law, these defendants testified that they calculated Haygood's term in a manner consistent with standard operating procedures, and responded to his numerous inquiries in accord with their general practice and understanding of their instructions. The Adult Authority's internal procedures not only permitted but also apparently approved these officials' conduct in repeatedly concluding their calculations with an erroneous release date. These facts at least require a consideration of the qualified immunity defense discussed in

Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982).

Qualified Immunity Defense

Even when the state government has done wrong, the officials who caused the injury can be shielded from liability if a defense is available under § 1983 (e.g., qualified immunity). Even the intentional deprivation of constitutional rights by state officials can be excused when those officials, in the exercise of reasonable good faith, believe their action or inaction to be lawful. See Albers v. Whitley, 743 F.2d 1372, 1376 (9th Cir. 1984), cert. granted, 105 S. Ct. 2700 (1985); Peraza v. Delameter, 722 F.2d 1455, 1457 (9th Cir. 1984); Burgwin v. Mattson, 522 F.2d 1213, 1214 (9th Cir. 1975), cert. denied, 423 U.S. 1087 (1976). See also Anderson v. Central Point Sch. Dist. No. 6, 746 F.2d 505 (9th Cir. 1984).

The district court in substance submitted to the jury the question whether the defendants acted reasonably when they responded to Haygood's inquiries. Haygood, 527 F. Supp. at 823. The court did not have the benefit of Harlow when it instructed the jury, but it gave substantially the defendants' requested instruction on good faith and reasonable conduct when it told the jury:

> That is to say, the law will change a person with notice and knowledge of whatever he would have learned, upon making such inquiry as it would have been reasonable to expect him to make under the circumstances.
>
> Knowledge or notice may also be established by circumstantial evidence. If it appears that a certain has existed for a substantial period of time, and that (the defendant) had regular opportunities to observe the condition, then you may draw the inference that he had knowledge of the condition.
>
> If after considering all of the circumstances as they reasonably appeared at the time when the defendant acted, it appears to you that a defendant reasonably believed that he was discharging the duties of his office and

> that the defendant acted in good faith on the basis of these beliefs, then his reasonable belief and good faith action would constitute a defense to the plaintiff's claims.

The jury in this case, after considering the court's instructions on qualified immunity, found for Haygood and decided that his damages against Cranke should be $640, and his damages against Seymour should be $1,450. These modest amounts awarded for some 17 months of extra time in prison after release was demanded do not reflect that the jury was prejudiced against the defendants by any imperfection in the instructions. The verdict did reflect the considered judgment of a jury that Frank Haygood had been wronged under color of law by two records officers who knew or should have known that he was entitled to be released earlier than he was released. Given the judge's instruction, the jury must have considered some element of good faith in

mitigation of damages, and also may have considered that these two defendants were relatively small cogs in the machine that malfunctioned. In any event, no useful purpose would be served by sending the case back for another trial on the qualified immunity defense at substantial expense to both parties when the plaintiff has not cross-appealed.

Conclusion

A prisoner's petition for damages for excessive custody can be a legitimate § 1983 claim. A court's first task is to determine whether Parratt (random act) or Logan (official practice and procedure) controls. If the wrongful taking of liberty results from either affirmatively enacted or de facto policies, practices or customs, the court must determine when the responsible state officers received notice of a claim that a wrong was being done. When an

official with the authority to rectify an erroneous practice receives notice of the wrongful practice and its harmful consequences, due process requires the state to provide a hearing before a further denial of liberty can be said to be free from § 1983 liability.

We conclude, therefore, that Haygood was deprived of his liberty under color of law. The Logan, rather than the Parratt rules apply, and Haygood has a cause of action under § 1983 for denial of liberty without due process, subject to the qualified immunity defenses.

The error in submitting the Eighth Amendment claim without an instruction requiring proof of deliberate indifference to the rights of the prisoner was not prejudicial to these defendants in light of

the record as a whole and does not justify a new trial.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK HAYGOOD,	No. 81-4686
Plaintiff-Appellee,	DC # CV-S-75-738-LKK
vs.	
EVELLE J. YOUNGER, etc.,	OPINION
Defendants,	
and	
HAROLD CRANKE and BENJAMIN SEYMOUR,	
Defendants-Appellants.	

Appeal from the United States District Court for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding
Argued and Submitted April 14, 1983

Before: WISDOM*, SNEED and FARRIS, Circuit Judges

SNEED, Circuit Judge:

Harold Cranke and Benjamin Seymour,

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*Honorable John Minor Wisdom, Senior Circuit Judge for the United States Court of Appeals for the Fifth Circuit, sitting by designation.

records officers at Folsom State Prison and the California Department of Corrections, respectively, appeal from the district court's denial of their motion for judgment notwithstanding the verdict in a section 1983 action. Frank Haygood alleged that Cranke and Seymour violated his due process and Eighth Amendment rights by improperly investigating his legal status while he was incarcerated pursuant to a series of concurrent and consecutive sentences. He contended that their conduct resulted in his unlawful confinement beyond the actual term of those sentences. The jury returned a general verdict of $2,090 in damages. Cranke and Seymour also appeal the award of $45,383 in attorney's fees. We reverse and remand.

I.

FACTS

The decision of the California Supreme Court, which appears in part in the

margin, granting Haygood's habeas corpus release.[1/] See In re Haygood, 14 Cal. 3d 802, 122 Cal. Rptr. 760 (1975). 1958 is a good year in which to commence the recital of facts particularly relevant to this case. Haygood escaped in that year from a prison camp while serving concurrent sentences previously designated as his "A" and "B" terms. While at large he committed a robbery, for which he received a sentence designated his "C" term. Subsequently he was convicted of the escape, for which he received a sentence designated his "D" term. Upon his return to prison, the Department of Corrections and the California Adult Authority treated his "D" term for escape as consecutive not only to his "A" and "B" terms, which he had been serving when he escaped, but also the "C" term imposed for the robbery he committed after escaping. Id. at 806-07, 122 Cal. Rptr. at 762-63.

On October 8, 1970, the Adult Authority granted Haygood a parole date of December 14, 1970. Had Haygood not violated his parole all terms would have been discharged on July 8, 1974. His "C" term was also fixed by the Adult Authority at ten years and his "D" term at five-and-one-half years resulting in a final discharge date of July 8, 1974, on all his terms. Because the October 8 action fixed the "C" term at less than the time already served, Haygood received an "administrative discharge" for that term retroactive to January 8, 1969, the date upon which he had served ten years on the term. The Adult Authority intended by this order to cause the "D" term to commence retroactively as of that date. Id. at 807, 122 Cal. Rptr. at 763. Although plaintiff's prison records indicated that he had completed the maximum possible sentence on his "A" and "B" terms as of 1963 and 1961,

respectively, the Adult Authority continued to refer to those terms in accordance with the "continuous term policy." That policy provided that when a prisoner receives a sentence which is to run consecutively to another term, no single term is discharged until all are. Each consecutive sentence was regarded as but a segment of a single continuous term.

Haygood, following his release on parole, violated his parole and was returned to prison. Again he was released and again he returned. At that time, December 13, 1973, the Authority, after finally revoking his parole, purported to refix his "C" and "D" terms at their maximum of life imprisonment. Id. at 807-08, 122 Cal. Rptr. at 763-64.

Thereafter Haygood received a form from the Adult Authority notifying him of his legal status. At trial he testified that he

thought the form indicated that he was still serving time on his "A" and "B" terms as well as his "C" term and that he had not been credited with having served any time on his "D" term. A correctional counselor at Folsom State Prison met with Haygood on at least five occasions to discuss these concerns. The counselor also discussed them with defendant Cranke, a Records Officer II at Folsom State Prison. Haygood later wrote to Cranke regarding his sentences. After reading the letter, Cranke reviewed Haygood's central file, which included his legal status form, the cumulative case summary, the abstracts of judgment, and materials from the sentencing proceedings. Cranke answered Haygood's concerns about his sentence by referring him to the continuous term policy set forth in two California Attorney General's opinions.

A short time later Haygood wrote a letter to the Administrative Officer of the Adult Authority, who, without acting, passed the letter on to defendant Benjamin Seymour, a Records Officer III for the Department of Corrections. Seymour reviewed Haygood's central file and pertinent Attorney General's opinions and spoke with Cranke to confirm Haygood's legal status. On April 1, 1974, Seymour sent a letter to Haygood responding to his questions.

Dissatisfied with these responses, Haygood filed a pro per petition for a writ of habeas corpus in the California Supreme Court. Id. at 804-05, 122 Cal. Rptr. at 761. In accord with the objections he had expressed in his letters, Haygood alleged that the Department of Corrections and the Adult Authority "had acted unlawfully in refixing certain of [his] terms . . . and in

revoking credit for time served on another." Id. at 805, 122 Cal. Rptr. at 761.

Counsel for Haygood was appointed and in a supplemental petition prepared by counsel it was alleged that the order of the sentencing judge on his 1959 escape conviction "did not purport to make the 'D' term consecutive to the 'C' term, and that even had the judge attempted to order that the 'D' term be consecutive to the 'C' term, he lacked the authority to do so." Id. at 808, 122 Cal. Rptr. at 764. A fellow prisoner who had aided Haygood in composing his numerous letters to prison authorities conceded at the section 1983 trial that neither he nor Haygood had had this theory in mind prior to appointed counsel's preparation of the supplemental petition.

The California Supreme Court by a six to one majority found the argument raised by the supplemental petition dispositive. It

held that the Department of Corrections and the Adult Authority had erroneously treated the "D" term as consecutive to the "C" term by misinterpreting the 1959 escape judgment. Haygood's terms had therefore effectively terminated no later than October 8, 1970, the date of the administrative action fixing his terms. Thus, the Adult Authority had no power to refix terms which he had already irrevocably discharged. The court ordered him released.

To this point this case presents nothing very unusual. The Adult Authority under California's then indeterminate sentencing procedures, which were in effect until 1976-77, miscalculated the release date of a recidivist prisoner. This mistake was corrected by the California Supreme Court as a result of Haygood's utilization of California's habeas corpus procedures. A

wrong done by officials of California was corrected by California courts.

This case commences to take on its present form when Haygood alleged in this section 1983 action that he had been deprived of his right to liberty without due process of law that he had been subjected to cruel and unusual punishment contrary to the Eighth Amendment as incorporated into the Fourteenth Amendment. The Attorney General of the State of California, the Director of the California Department of Corrections, members of the California Adult Authority, the Administrative Officer for the Adult Authority, and four prison officials, including Cranke and Seymour, were named as defendants.

On April 3, 1976, the district court dismissed the complaint as to the Attorney General and the Adult Authority members on the ground that they were absolutely immune.

On January 5, 1978, the court dismissed the Director insofar as the complaint sought damages. On March 21, 1978, the court dismissed the complaint as to all defendants insofar as it sought declaratory relief. On the third day of trial, the court granted the motion for directed verdict as to two of the prison officials and the Administrative Officer for the Adult Authority, but denied it as to Cranke and Seymour, the remaining defendants. The jury returned a general verdict against Cranke for $640 and against Seymour for $1,450. The trial court denied their motion for judgment notwithstanding the verdict. See Haygood v. Younger, 527 F. Supp. 808 (E.D. Cal. 1981).

We have disposed of Haygood's appeals from the pretrial dismissals by unpublished memorandum order. This appeal concerns only the propriety of the trial

court's denial of the motion for judgment notwithstanding the verdict.

Cranke and Seymour contend that the district court erred in seven different ways. These are:

1. By ruling that simple negligence can support a cause of action under section 1983 founded on deprivation of due process and Eighth Amendment rights;

2. By holding that the availability of a tort remedy under California law did not provide Haygood due process so as to preclude his section 1983 suit;

3. By finding the evidence introduced at trial sufficient to support the jury verdict;

4. By denying their motion for directed verdict based on a good faith defense;

5. By awarding Haygood attorney's fees under section 1980;

6. By denying discovery and an evidentiary hearing on the issue of the reasonableness of Haygood's attorney's fees; and

7. By awarding attorney's fees which were grossly disproportionate to Haygood's recovery.

The first, second, and seventh assigned errors present legal issues, the third and fourth go to the sufficiency of the evidence, and the fifth and sixth raise issues that pertain to the manner in which the trial court exercised its discretion. Our disposition turns on legal issues reasonably embraced by appellant's first two assigned errors. As a consequence, our review is de novo.

The approach we employ best can be understood by setting forth the main points of the district court's analysis of this case which appears in its published opinion. See Haygood v. Younger, 527 F. Supp. 808 (E.D. Ca. 1981). The district court held, first, that the plaintiff was improperly deprived of his liberty; second, that this deprivation was done under "color of state law"; third, that 42 U.S.C. § 1983 requires no particular state of mind on the defendant's part;

fourth, that post-deprivation processes in the case of a deprivation of liberty can never provide the "due process" required by the Fourteenth Amendment because money damages can never restore previously lost liberty; fifth, that plaintiff's incarceration beyond the expiration of his term even for one day was "cruel and unusual punishment" within the meaning of the Eighth Amendment; sixth, that, inasmuch as no particular state of mind is required by section 1983, the charger to the jury that to find for the plaintiff it must find that the defendants "by their actions intended to punish plaintiff and that this punishment violated the basic prohibition against inhuman treatment," was more favorable to the defendants than the law required; and, finally, that the jury could reasonably conclude that the defendants failed to establish that they acted entirely in good

faith and that their belief in the correctness of their actions was reasonable.

We readily agree with the district court's first two points and are prepared to assume, arguendo, that the third is also correct with respect to section 1983 suits alleging deprivations of liberty or property without the due process required by the Fourteenth Amendment. We reject the third point to the extent it relates to suits alleging Eighth Amendment violations as our discussion below will indicate. We disagree, moreover, with the fourth, fifth, and sixth points of the district court. We hold, accordingly, that post-deprivation processes can provide the "due process" required by the Fourteenth Amendment and that Haygood's incarceration beyond the expiration of its term even for one day was not ipso facto "cruel and unusual punishment" within the meaning of the Eighth Amendment. Because the

district court's approach to the trial of this case was thoroughly infused with its fourth, fifth, and sixth points, our disagreement with these positions, as well as our limited disagreement with the third, requires that we reverse the judgment of the district court in its entirety. Pursuant to the provisions of Rule 50(d) F.R. Civ. P., we remand for a new trial.

II.

DEPRIVATION OF LIBERTY AND POST-DEPRIVATION DUE PROCESS

A.

In Parratt v. Taylor, 451 U.S. 527 (1981), the Supreme Court indicated that negligence might suffice to support a section 1983 cause of action. It did this most strongly by its observation that "[b]oth Baker v. McCollan [443 U.S. 137 (1979)] and Monroe v. Pape [365 U.S. 167 (1961)] suggest that § 1983 affords a 'civil remedy' for

deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind." 451 U.S. at 535. The proposition was not essential to the decision. Justice Powell, believing that the Court had decided this threshold question without squarely addressing it, concurred only in the result. 451 U.S. at 546; see also id. at 554 (Marshall, J., concurring in part and dissenting in part). Nonetheless, we have previously read Parratt to hold that negligence alone can support a section 1983 cause of action. See Hirst v. Gertzen, 676 F.2d 1252, 1262-63 (9th Cir. 1982); accord Fernandez v. Chardon, 681 F.2d 42, 55 (1st Cir. 1982), cert. denied in part, 103 S. Ct. 343 (1982), aff'd on other grounds sub nom. Chardon v. Soto, 103 S. Ct. 2611 (1983); Mills v. Smith, 656 F.2d 337, 340 n.2 (8th Cir. 1981). Contra Price v. Baker, 693 F.2d

952, 953 (10th Cir. 1982) (notwithstanding Parratt, "uncertainty whether negligence will support a § 1983 action").

Recognition that a section 1983 action can rest on negligent conduct pushes to the forefront the issue whether post-deprivation process can satisfy the Fourteenth Amendment requirement of due process. A pre-deprivation hearing is not feasible with respect to a deprivation caused by negligence. Parratt v. Taylor resolved the issue affirmatively by holding that the state tort remedies for wrongful deprivation of a prisoner's property satisfied the due process requirement.

Parratt v. Taylor, however, involved a deprivation of property--not liberty. Courts are divided on the question whether Parratt applies to deprivations of liberty interests. Compare Daniels v. Williams, ___ F.2d ___ (4th Cir. 1983) (Parratt applies to

some deprivations of non-property interests including negligent deprivation of liberty interests); Wolf-Lillie v. Sonquist, 669 F.2d 684, 871 (7th Cir. 1983) (Parratt "requires federal courts to consider the adequacy and availability of remedies under state law before concluding that a deprivation of life, liberty, or property violates due process of law"); Ellis v. Hamilton, 669 F.2d 510, 515 (7th Cir.), cert. denied, 103 S. Ct. 488 (1982); Juncker v. Tinney, 549 F. Supp. 574, 576-79 (D. Md. 1982), with Brewer v. Blackwell, 692 F.2d 387, 394-95 (5th Cir. 1982) (Parratt does not apply to deprivations of liberty). The issue is unsettled in this circuit. Compare Rutledge v. Arizona Board of Regents, 660 F.2d 1345, 1352 (9th Cir. 1981) (Parratt applies; no due process violation; section 1983 cause of action unavailable), aff'd on other grounds sub nom. Kush v. Rutledge, 103 S. Ct. 1483 (1983),

with Wakinekona v. Olim, 664 F.2d 708, 715 (9th Cir. 1981) (Parratt does not apply; due process violation; section 1983 cause of action available), rev'd on other grounds, 103 S. Ct. 1741 (1983).

In refusing to apply Parratt, the Wakinekona court pointed our that Justice Blackmun's concurrence, with Justice White endorsed, limited the case to property interests. 664 F.2d at 715; see 451 U.S. at 545. However, such a limitation appeared neither in the Court's opinion, which commanded five votes in addition to those of Justices White and Blackmun, nor in the concurrence of Justice Stewart, one of those who joined the majority. Moreover, Justice Blackmun provided no rationale for the limitation he suggested. Nor did the Wakinekona court, which simply pronounced that cases "dealing with a liberty interest

[are] of a wholly different nature" than those involving property. 664 F.2d at 715.

The Fifth Circuit in Brewer, which also refused to apply Parratt to liberty interests, relied on the narrow reading given that case by the Court in Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-37 (1982), as well as on the citation in Logan to Justice Blackmun's concurrence in Parratt. 692 F.2d at 394-95; see 455 U.S. at 436. Logan, however, presents an issue different from that involved here. A charge with the Illinois Fair Employment Practices Commission was filed by Logan alleging that his employer had wrongfully discharged him because of physical handicap. At the time, the Illinois fair employment statute required that the Commission hold a factfinding conference within 120 days, which it failed to do for reasons beyond Logan's and his employer's control. The Illinois Supreme Court held

that the Commission's failure to convene in a timely manner the statutorily mandated conference deprived the Commission of jurisdiction and extinguished Logan's cause of action. It rejected his due process and equal protection arguments, finding that the procedures established by the statute were reasonable.

The Supreme Court reversed. It concluded that due process required that:

> [T]he Commission consider the merits of [Logan's] charge, based upon the substantiality of the available evidence, before deciding whether to terminate his claim. . . . A system or procedure that deprives persons of their claims in a random manner, as is apparently true of [the Illinois statute], necessarily presents an unjustifiably high risk that meritorious claims will be terminated.

455 U.S. at 434-35. The Logan Court distinguished Parratt because Logan challenged "the 'established state procedure' that destroys his entitlement without according him proper procedural safeguards."

Id. at 436. Logan complained about a systemic procedural deficiency, not about an unexpected or random error. While the Court cited Justice Blackmun's concurrence in Parratt to support its position, nothing in the holding or analysis of Logan required the Court to undermine Parratt.

Whether a process statutorily provided for a certain purpose satisfies the Fourteenth Amendment's due process requirement is one issue. Whether, following a deprivation of liberty for which a pre-deprivation hearing would not be feasible, the post-deprivation process can satisfy the Fourteenth Amendment is another. And if this question is answered affirmatively, a third issue is whether the available post-deprivation process does satisfy the Fourteenth Amendment. Logan is concerned only with the first issue; in this case we are concerned with the second and

third. It is true that the first and the third resemble each other. However, the first is concerned with pre-deprivation situations while the third only arises when pre-deprivation processes are not feasible.

Thus, the Logan Court found the state system unconstitutional. The statute was deficient because it provided inadequate pre-deprivation process under circumstances in which such process was feasible. It provides no guidance with respect to situations in which pre-deprivation process is not feasible.

The district court here refused to apply Parratt's reasoning to liberty interests because it believed that to do so would revive the requirement, rejected at least since Monroe v. Pape, 365 U.S. 167 (1961), that a section 1983 plaintiff must first exhaust state remedies. See 527 F. Supp. at 815; cf. Patsy v. Board of Regents,

457 U.S. 496 (1982) (exhaustion of state administrative remedies is not a prerequisite to a section 1983 action). We disagree. This objection amounts to a rejection of the reasoning of Parratt; it has no greater force with regard to a liberty interest than to a property interest. It misperceives Parratt's import by confusing the rights accorded by the Fourteenth Amendment's due process clause with the remedy afforded by section 1983. Parratt did not deny Taylor a remedy; it defined his rights. The decision does not require that state remedies be exhausted. It held that no constitutional violation occurred. Resort to federal court in situations encompassed by its rationale is foreclosed. See Ellis, 669 F.2d at 515; Juncker, 549 F. Supp. at 578. And for that matter, so is recourse to state courts on a section 1983 claim.

We hold, therefore, that Parratt applies to situations in which process prior to deprivation of liberty would not be feasible or practicable. It is the adequacy of the state post-deprivation process that is properly at issue once it is clear that pre-deprivation process was neither feasible nor practicable. The distinction between deprivations of property and those of liberty in that context is unimportant.

The district court obviously did not embrace this position. It focused first on the rights guaranteed Haygood rather than the remedies available to him. 527 F. Supp. at 814. It reasoned that since the state had lawfully confined Haygood after conducting a hearing, "he had a correlative due process right to be released from prison when his lawfully fixed term of imprisonment expired." Id. Thus, it concluded, "the process to which Mr. Haygood was entitled was to have

his liberty restored him at the precise moment fixed by state law." Id.

This analysis is fatally flawed. It makes the deprivation itself a denial of due process. That amounts to saying that a deprivation of liberty, i.e., a wrongful incarceration, is a violation of the Fourteenth Amendment without regard to whether the available process was adequate or inadequate, pre-deprivation or post-deprivation. That is not the law. The Fourteenth Amendment protects only against deprivations without due process of law. See Parratt, 451 U.S. at 537; Baker, 443 U.S. at 145. Section 1983 does not provide a cause of action for every wrongful or improper deprivation of either liberty or property by a state without regard to the process by which it is accomplished. It is not an insurance policy against mistakes being made by those acting under the color of state law.

It only insures against mistakes made in the absence of "due process."

The district court found Parratt inapplicable in part because of its belief that no process could be "due" inasmuch as money damages can never adequately compensate for a deprivation of liberty. It is true that money cannot restore even a moment of the past. However, that is true without regard to whether Haygood has a cause of action under section 1983 or not. The inability of money to restore liberty previously lost is simply irrelevant to whether Parratt is applicable to deprivations of liberty.

B.

It remains for us to determine whether the process accorded Haygood meets the constitutional standard of "due process." Haygood was accorded substantial, but as it turned out not mistake free, "process"

commencing shortly after the date on which it was later determined that he should have been released. On October 8, 1970, the Adult Authority fixed both his "C" and "D" terms and a parole date of December 14, 1970. As already pointed out, had plaintiff not violated his parole all terms would have been discharged on July 8, 1974. However, twice his parole was suspended and finally revoked on December 13, 1973. Thereafter commenced the plaintiff's encounters with the defendants and others in which he insisted that he, in some fashion or other, was being required to serve more time than his sentences required. This, too, was part of the "process" afforded the plaintiff by the State of California. Additional "process" was afforded by way of the habeas corpus proceedings which, unlike other "process" to which plaintiff enjoyed access, achieved the end he sought--his release from prison.

Finally, a remedy under state tort law existed of which Haygood failed to take advantage.

We hold this array of "processes" is sufficient to meet the constitutional requirement. Under the facts of this case, the distinction between pre- and post-deprivation process does not loom as large as it might. Process commenced after the expiration of the "A" and "B" terms, viz., October 8, 1970, and before the "C" term was fixed, which term after being so fixed was retroactively treated as discharged as of January 8, 1969. We know not what the Adult Authority would have done had it not believed that the "D" term had not been served. Arguably "process" can be said to have commenced before the deprivation of liberty and continued thereafter. In any event it was a continuous process that was responsive to the rules of the Adult

Authority as the officials then understood them, as well as to Haygood's complaints. When this is realized the true nature of this case becomes clear. It is simply an instance in which the proper authorities understood the California law of indeterminate sentences in a fashion subsequently determined to be incorrect by the Supreme Court of California on a six to one vote. No liberty interest of the defendant was stripped from him without due process. All available process, both before and after the deprivation of liberty, was accorded Haygood. That which was utilized post-deprivation was not feasible before deprivation. That the process was lengthy does not in this setting make it constitutionally inadequate. Neither does the fact that only the state court of last resort set matters aright. Arguing that processes that ultimately vindicated the

claim asserted are constitutionally deficient is surprising, if not perverse.

III.

EIGHTH AMENDMENT

As already indicated we reject the district court's view that a single day's incarceration beyond a prisoner's lawful term is "cruel and unusual punishment" within the meaning of the Eighth Amendment. Our approach to the Eighth Amendment issue rests on four separate but interrelated propositions.

(1) Detention of the plaintiff beyond the termination of the sentence under the facts of this case was punishment within the constitutional sense of the term. See Bell v. Wolfish, 441 U.S. 520, 535-40 (1979).

(2) Punishment to be cruel and unusual, that is to be incompatible with "the evolving standards of decency that mark

the progress of a maturing society," Trop v. Dulles, 356 U.S. 86, 101 (1958), must involve an unnecessary and wanton infliction of pain or be grossly disproportionate to the severity of the crime. See Solem v. Helm, 103 S. Ct. 3001, 3006 (1983); Rhodes v. Chapman, 452 U.S. 337, 346 (1981); Estelle v. Gamble, 429 U.S. 97, 102-03 (1976).

(3) Detention beyond the termination of the sentence constitutes cruel and unusual punishment when it results from "deliberate indifference" to the prisoner's interest in liberty. See Estelle v. Gamble, 429 U.S. at 104, 104-06.

(4) Detention beyond the termination of the sentence that is not the result of "deliberate indifference" must be measured against the Due Process Clause of the Fourteenth Amendment. Cf. City of

Revere v. Massachusetts General Hospital, 103 S. Ct. 2979, 2983 (1983) (where the Eighth Amendment rights are not violated, Due Process Clause governs alleged deprivations of liberty); Bell v. Wolfish, 441 U.S. at 535 n.16 (the Due Process Clause, rather than the Eighth Amendment, governs the rights of of pretrial detainees).

From these propositions it follows that the district court erred in its fifth and sixth holdings and that it improperly instructed the jury with respect to the alleged Eighth Amendment violations. The authority for these propositions is indicated therein.

Admittedly, suits seeking damages for post-sentence-termination detention are rare, and legal authority sparse. One case has been found subjecting such detention to due process analysis, Douthit v. Jones, 619 F.2d 527 (5th Cir. 1980), but none subjecting

it either to automatic Eighth Amendment proscription or to Eighth Amendment scrutiny. It appears to be a novel issue. Evidence of its novelty can be demonstrated by making the assertion that those whose convictions are overturned by post-conviction remedies may have a section 1983 cause of action against the convincing state or a Bivens-type cause of action against the convincing United States. The books presently contain few if any cases making this assertion.

The foundation on which the above propositions rest is that not all improper punishment is cruel and unusual. That being so, the issues this case presents are whether Haygood's post-sentence-termination detention was (1) cruel or unusual, or (2) in violation of the Due Process Clause of the Fourteenth Amendment. The first must be resolved negatively if the improper punishment was not imposed as a result of "deliberate

indifference" and similarly must the second if the "process" available meets, as we have held it does in this case, the constitutional standard of "due." Because the district court did not approach the case in this fashion we reverse and remand for a new trial.

Our major difference with the district court in the Eighth Amendment area is that, unlike the district court, we find that "cruel and unusual" requires a degree of culpability on the part of state officials. Cases arising from analogous situations support this approach by employing the "deliberate indifference" standard.[2/] To treat as "cruel and unusual" incarceration even for a moment without regard to the fault of those responsible is to drain "cruel and unusual" of its fault content and to obscure the socially useful distinction between being "bad," on the one hand, and being merely

"mistaken" on the other. To treat the "mistaken" as if they were "bad" removes an incentive to avoid evil. Use of the standard "deliberate indifference" retains the incentive and avoids treating "cruel and unusual" as describing only a type of absolute liability. A society that treats the "mistaken" as it does the "bad" must accept treating the "bad" as it does the "mistaken." The latter, at least, will prove offensive to most of us.

We do not mean to suggest that the "deliberate indifference" standard should be employed universally in determining whether certain punishment is "cruel and unusual." For example, certain prison conditions, arguably grossly disproportionate to the severity of all or most of the crimes committed by the inmates, might be the result of public "deliberate indifferences" rather than such indifference on the part of prison

officials. The good faith and deep concern of these officials would not preclude confronting a claim based on the Eighth Amendment in which substantial changes in prison conditions were sought. Our resort to the "deliberate indifference" standard, fashioned by the Supreme Court in response to charges of medical neglect of a particular prisoner, merely recognizes that a charge of legal neglect on the part of officials of the Adult Authority of an individual prisoner, which is the essence of Haygood's charges, is sufficiently similar to medical neglect to justify using the same standard. To impose a more demanding standard embraces liability without fault, which we are unwilling to do, while to impose a more lenient standard departs without good reason from equal treatment. We limit the "deliberate indifference" standard to those situations in which a prisoner complains of specific

mistreatment not generally suffered by all inmates.

IV.

THE GOOD FAITH DEFENSE

Because we are remanding this case for a new trial we comment on the manner in which the good faith defense should function. The district court approached the good faith defense on the assumption that the defendants could have determined their computational error had they taken the trouble to study the plaintiff's file with reasonable care. Haygood v. Younger, 527 F. Supp. at 822-24. While we are not prepared to say that a jury could not have so found, we are convinced, after reviewing the transcript of the trial, that another view of the evidence is not unreasonable. That alternative is that neither the defendants nor their superiors saw any error in their computation and that

their interpretation of the law was not unreasonable.

In light of the evidence the district court should have instructed the jury on the good faith defense in the manner required by Harlow v. Fitzgerald, ___ U.S. ___, 102 S. Ct. 2727 (1982). This is true, although the trial in the case antedates Harlow, because the essence of the defense was clearly established previously. See Procunier v. Navarette, 434 U.S. 555 (1978). Under Harlow government officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." ___ U.S. at ___, 102 S. Ct. 2738. Thus, the good faith defense exists if the conduct complained of does not violate "clearly established statutory or constitutional rights of which a

reasonable person would have known." Harlow's standard is objective. Of course, an official who knows that his conduct violates the law cannot shield himself by insisting that all others were reasonably less well informed.

We note, however, that there is some overlap between our "cruel and unusual punishment" analysis and Harlow's enunciation of the good faith defense. To illustrate, a proper charge on the Eighth Amendment grounds of recovery should embody the "deliberate indifference" standard set forth in Estelle v. Gamble. A jury so charged that returned a verdict finding cruel and unusual punishment under this standard could not consistently find that the defendants had proved the good faith defense. That is those "deliberately indifferent" to the plaintiff's detention could not show that they had not violated "established statutory or constitutional

rights of which a reasonable person would have known."

From this, as well as our holding that the process afforded Haygood both before and after the improper deprivation of liberty met constitutional standards, it follows that a new trial must be focused exclusively on whether Haygood was subjected to cruel or unusual punishment under the "deliberate indifference" standard. The "good faith" defense has no legitimate role to play on remand. Should it be determined that the punishment was not "cruel and unusual" the defendants are absolved of all liability. A finding of "cruel and unusual" punishment, on the other hand, under the circumstances of this case, eliminates the possibility of establishing a good faith defense.

In view of the remand we set aside the award of attorney's fees without prejudice to its reinstatement or

modification should the outcome of a new trial so warrant.

REVERSED AND REMANDED.

FOOTNOTES

1. WRIGHT, Chief Justice.

We issued an order to show cause in response to a petition for writ of habeas corpus prepared in propria persona by Frank Haygood, an inmate of the California State Prison at Folsom, alleging that the Department of Corrections and the Adult Authority had acted unlawfully in refixing certain of the terms to which he has been sentenced and in revoking credit for time served on another. Counsel was appointed for petitioner. His review of conviction a .. sentencing data relative to petitioner's confinement led him to conclude that additional issues should be raised on petitioner's behalf. By leave of the court a supplemental petition was filed and respondent Department of Corrections has replied to both the original and supplemental petitions, which we shall hereinafter refer to in the singular as the petition. We have concluded, based on the undisputed facts set out in the petition and the return thereto, that petitioner's terms as fixed by the Adult Authority (Authority) had been fully served prior to the date upon which the Authority last purported to extend them, and that notwithstanding any erroneous legal conclusions that may have influenced the Authority when it fixed those terms, petitioner is entitled to be discharged.

In 1946 petitioner was convicted of escape in violation of Penal Code Section

4530. He was sentenced to the term prescribed by law which was then a term of imprisonment not exceeding 10 years. It is undisputed that petitioner was discharged from this "original" term on June 29, 1953.

On March 24, 1949, petitioner was convicted of five counts of forgery in violation of section 470. He was sentenced to concurrent terms of 1 to 14 years' imprisonment. These "A" terms were concurrent with the "O" (original) term and commenced on April 1, 1949, when petitioner was delivered to the custody of the Department of Corrections.

On April 23, 1956, petitioner was convicted of carrying a concealed weapon in violation of section 12021. The offense was committed while petitioner was serving his "A" terms on parole. He was sentenced to a term not exceeding five years. This "B" term, which was concurrent with the "A" terms, commenced April 25, 1956. Although its records reflect no discharge from the "A" and "B" terms, but instead indicate service of more than 23 years on the 14-year maximum "A" terms and 18 years on the 5-year maximum "B" term, before this court respondent concedes that the maximum duration of the "A" and "B" terms was approximately April 1963 and May 1961, respectively. The Department of Corrections and the Adult Authority should, therefore, correct their records accordingly to reflect petitioner's discharge from the "A" and "B" terms.

On or about December 21, 1958, however, while he was still serving the "A" and "B" terms, petitioner escaped from a prison camp and shortly thereafter participated in a robbery. He was prosecuted first for the robbery and on January 5, 1959, was convicted and sentenced to a term of not less than one year for violation of section 211. This "C" term, which was concurrent with the then uncompleted "A" and "B" terms, commenced January 8, 1959.

Petitioner then pleaded guilty to escape in violation of section 4531, which has since been repealed. Two prior convictions charged in the information--the 1949 forgery and the 1956 concealed weapon convictions--were stricken prior to the plea. He was sentenced on April 14, 1959.

In sentencing petitioner for the escape the court orally recited that "he be committed to the state prison for the term prescribed by law, the sentence to run at the time he would otherwise have been discharged." The abstract of judgment, which erroneously included the stricken prior convictions, properly reflected the oral pronouncement of judgment. After printed language which read, "It is ordered that the sentences shall be served in respect to one another as follows," a section intended to apply only to sentences on multiple counts in the same judgment, the following typewritten entry appears: "Sentence to commence at the time said defendant would otherwise have been discharged." Following the printed entry "and in

respect to any prior incompleted sentence(s) as follows" a typewritten entry states, "Same as above." The instructions on the printed form direct the court to enter there its ruling whether the new term is to be "concurrent or consecutive to all incomplete sentences from other jurisdictions." Notwithstanding the sentencing judge's use of the statutory language of section 4531 that the term commence when petitioner "would otherwise have been discharged" from the terms he was serving at the time of the escape, i.e., the "A" and "B" terms, the Department of Corrections and the Adult Authority treated the escape term as consecutive not only to the "A" and "B" terms that petitioner was serving at the time of his escape, but also to the "C" term for the robbery he committed after the escape.

On October 8, 1970, after petitioner had served the maximum permissible number of years on the "A" and "B" terms, the Adult Authority fixed petitioner's "C" term at 10 years, and entered on its records an "administrative" discharge of the "C" term retroactive to January 8, 1969, the date upon which he had completed service of 10 years on that term. At the same time the Authority fixed petitioner's "D" term at five and one-half years with a discharge date of July 8, 1974, and set a parole date of December 14, 1970. The Authority intended by this order to cause the "D" term to commence retroactively as of January 8, 1969, the date of the discharge from the "C" term.

The Authority suspended petitioner's parole on January 7, 1972. By operation of Adult Authority policies then in effect, that suspension automatically caused any incompleted terms to be refixed at maximum. On March 14, 1972, in conjunction with the formal revocation of parole, the Authority again fixed the "C" term at 10 years, and this time fixed the "D" term at 6 years with a January 8, 1975, expiration date. Petitioner was again released on parole, but on April 27, 1973, his parole was suspended, again causing his terms to be refixed at maximum. On December 13, 1973, parole was formally revoked. His terms have not been refixed at less than maximum since that date. Although petitioner had served the period from January 8, 1969, to April 27, 1973, on his "D" term, the effect of refixing his "C" term at the life maximum, according to respondent, was to deny him any credit on the "D" term because that term could not commence until his discharge from the "C" term. Therefore, although 16 years have passed since petitioner was sentenced on the escape conviction, and even though he had once been given credit for service of over 4 years on that term, respondent now considers him to be serving only the "C" or robbery term. According to respondent, his "D" or escape term has not commenced. Thus petitioner, having once reached the goal of "administrative discharge" from his "C" term, and having embarked on service of his "D" term, like Sisyphus finds himself back again at the beginning, destined to endlessly repeat his own odyssey through the term-fixing process.

In re Haygood, 14 Cal. 3d at 804-08, 122 Cal. Rptr. at 761-64 (footnotes omitted).

2. See e.g., Wright v. Wagner, 641 F.2d 239, 241-42 (5th Cir. 1981) (failure to place self-destructive prisoner in padded cell violates Eighth Amendment only if it resulted from deliberate indifference); Orpiano v. Johnson, 632 F.2d 1096, 1101 (4th Cir. 1980) (prison supervisors liable for failure to prevent beating of prisoners by guards only if supervisors' conduct was "'deliberate indifference' or . . . 'tacit authorization of the offensive acts . . .'"); Little v. Walker, 552 F.2d 193, 197 n.8 (7th Cir. 1977) (inadequate protection of prisoners violates Eighth Amendment if it results from deliberate indifference); West v. Rowe, 448 F. Supp. 59, 60 (N.D. Ill. 1978) (failure to respond to prisoner's letters stating that he was in danger is actionable if it resulted from deliberate indifference).